TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. 812 34

TEXTILE MILLS SECURITIES CORPORATION,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1941.

CERTIORARI GRANTED MARCH 31, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 812

TEXTILE MILLS SECURITIES CORPORATION, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1941.
—3811

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 75423

TEXTILE MILLS SECURITIES CORP., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Edmund S. Kochersperger, Esq.
For Comm'r: J. H. Pigg, Esq., R. P. Hertzog, Esq.

DOCKET ENTRIES

1934

Apr. 5—Petition received and filed. Taxpayer notified. (Fee paid)
Apr. 5—Copy of petition served on General Counsel.
May 25—Answer filed by General Counsel.
June 2—Copy of Answer served on taxpayer.
Aug. 29—Motion for circuit hearing at New York City filed by taxpayer. 8-31-34 granted to circuit calendar.

1936

Mar. 5—Hearing set May 21, 1936 at New York City.
[fol. 2] May 11—Motion for continuance to next circuit calendar in New York filed by taxpayer.
May 12—Order of continuance to May 26, 1936, on the present New York calendar, and be called on the last mentioned day, in accordance with the notice of hearing heretofore issued, entered.
May 25—Hearing had before Mr. Morris on petitioner's motion to continue. Continued to Fall Calendar at Washington, D. C.
May 25—Order continuing to Fall Calendar for hearing in Washington, D. C. entered.
Oct. 9—Hearing set Dec. 15, 1936.
Dec. 15—Hearing had before Mr. B. B. Turner, Div. 8. Submitted on the merits. Stipulation of facts filed. Petitioner's brief due Jan. 29, 1937—Respondent's brief due March 1, 1937—Petitioner's reply due March 16, 1937.

1937

Jan. 5—Transcript of hearing of Dec. 15, 1936 filed.
Jan. 29—Brief filed by taxpayer. 1-29-37 copy served.

1938

Sept. 28—Findings of fact and opinion rendered, Mr. Turner, Div. 8. Decision will be entered under Rule 50.
Nov. 8—Computation as to deficiency filed by General Counsel.
Nov. 12—Hearing set Nov. 30, 1938 on settlement.
[fol. 3] Nov. 21—Consent to settlement filed by taxpayer.
Nov. 28—Decision entered, Bolon B. Turner, Div. 8.

1939

Feb. 13—Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by General Counsel.
Feb. 18—Proof of service filed by General Counsel. (Attorney)
Feb. 23—Proof of service filed by General Counsel. (Taxpayer)
Mar. 27—Certified copy of order from the 3rd Circuit re transmission of physical exhibits filed.
Apr. 12—Agreed praecipe filed by General Counsel. Proof of service thereon.

[fol. 4] Before United States Board of Tax Appeals

Petition—Filed April 5, 1934

First:

Petitioner is a corporation organized under the laws of the State of Delaware and having its place of business in Passaic, New Jersey. Return for the calendar year 1931 was duly filed with the Collector of Internal Revenue at Newark, New Jersey. Returns for the calendar years 1928, 1929 and 1930 were duly filed with the Collector of Internal Revenue at New York City.

Second:

The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on or after February 8, 1934.

Third:

The taxes in controversy are income taxes for the calendar year 1931 and for $14,085.27 asserted as a deficiency.

Fourth:

The determination of tax and deficiency set forth in the said notice of deficiency is based upon the following errors:

(a) Determination of net income for 1931 instead of a net loss.

(b) Determination of net income for 1930 instead of a net loss, deductible against any 1931 net income.

[fol. 5] (c) Determination of net income for 1929 instead of a net loss, deductible against any 1931 net income.

(d) Failure to apply a regular, consistent theory in the auditing of the petitioner's returns for the years 1928, 1929, 1930 and 1931.

(e) Failure to apply as a credit under the obligatory provisions of the statute, within the period of limitations, the petitioner's overpayment of taxes for the year 1928 or to advise the petitioner of such overpayment in order to permit the due filing of a claim for refund by the petitioner for the year 1928 as a credit against any taxes properly due for the year 1931.

(f) Disallowance of expenses for the years 1929 and 1930 on the ground that such expenses were accrued-expenses for the year 1928, without at the same time transferring as accrued-income for the year 1928, certain items of income reported by the petitioner as income for the years 1929, 1930 and 1931, such transfer to 1928 resulting in a net loss sustained by the petitioner for the year 1931.

(g) Failure to determine net losses for the years 1929 and 1930 as deductions against any net income for the year 1931.

(h) A reversal of position by the respondent to his advantage and to the detriment of the petitioner under circumstances whereby the respondent is now estopped to determine any deficiency for the year 1931.

(i) Erroneous application of Regulations 74, Article 262, [fol. 6] relied upon by respondent in said Exhibit "A".

Fifth:

The petitioner pleads specially that the respondent is now estopped from asserting any deficiency against the petitioner for the year 1931, by the respondent's conduct in the following respects:

Under its system of accounting, as to which the respondent was advised and informed through successive audits over a period of years, the petitioner reported net income for the year 1928 and paid taxes thereon in the amount of $10,788.6'. Said return for the year 1928 was audited by the respondent and approved. For the years 1929 and 1930 the petitioner filed its returns and reported its accounts upon the same system of accounting; the respondent's audits of net losses for the years 1929 and 1930 approved the returns as filed for said years, said approval being made within a period of time whereby if the respondent had then taken his present position there would have been an overpayment of taxes by the petitioner for the year 1928 to be automatically applied by the respondent as a credit against any taxes due for the year 1931 or the petitioner would have been so advised of such overpayment as to permit the filing of a claim for refund as to taxes so paid for the year 1928. Long after the period has expired for the respondent's application by way of credit to 1931 for any overpayment as to 1928, the respondent now attempts to reverse his previous approval of the returns for 1929 and 1930, to his benefit and to the detriment of the petitioner. Having so benefited by his error or misconduct and having induced the petitioner to believe that [fol. 7] its returns for the years 1929 and 1930 correctly reported losses and that the expenses of those years should not be accrued to the year 1928 with resulting overpayment of taxes for the year 1928 and, by such belief, having caused the petitioner to refrain from the filing of a claim for refund in order that such overpayment for the year 1928 might be credited after the expiration of the statute of limitations to and against any lawful taxes assertible for the year 1931, the respondent is now estopped from asserting any deficiency for the year 1931, by the same token that the petitioner would be barred by estoppel if the circumstances were reversed of recovery for an overpayment. By force of such estoppel this honorable Board should enter its order of Judgment for the Petitioner.

Sixth:

The facts upon which the petitioner relies as the basis of this proceeding in addition to the facts heretofore alleged and as an alternative to said pleading by way of estoppel, are as follows:

(a) The alleged deficiency for the year 1931 results from the respondent's disallowance of net losses for the years 1929 and 1930, without changing the reported income for 1931.

(b) The respondent's disallowance of net losses for the years 1929 and 1930 is expressed in said Exhibit "A" as for the following reasons:

"Your contention for the allowance of deductions for expenses incident to the enactment of legislation authorizing the return of property of certain German citizens and cor- [fol. 8] porations seized during the World War, has not been conceded for the reason that the services were performed during the year 1928 when the Settlement of War Claims Act was passed.

"Inasmuch as your books were kept on the accrual basis, the amount of $143,500.00 so expended should have been accrued as at December 31, 1928."

(c) In its return for the year 1931 the petitioner reported within its Gross Income the item of "Commissions Receivable $183,048.15".

(d) Said item of $183,048.15 was audited by the respondent and was found to reflect the collection from "certain German citizens and corporations" of amounts owing by reason of the enactment of said Settlement of War Claims Act in 1928.

(e) The respondent's audit of the petitioner's return for the year 1931 made no change or correction other than a disallowance of the alleged net losses for the years 1929 and 1930.

(f) The net losses for 1929 and 1930 so claimed by the petitioner as deduction for 1931 were $124,992.39.

(g) The exclusion from gross income of 1931 of said item of $183,048.15 and the exclusion as deduction of said item of $124,992.39 would cause the petitioner to have sustained

a net loss in the year 1931 of $65,670.91 in which event there is no deficiency for 1931.

(h) The net loss reported upon the petitioner's re- [fol. 9] turn for 1931 in the amount of $7,615.15 has been converted by the respondent into net income for 1931 of $117,377.24 solely by the exclusion as a deduction of the amount of $124,992.39 as prior year net losses and the deficiency now asserted for the year 1931 in the amount of $14,085.27 solely results from the application of the tax rate at 12% to said amount of $117,377.24.

(i) The contracts by which the petitioner gained the right to commissions for services performed, required that the petitioner bear all expenses connected with the engagement of others in the performance of such services out of such commissions so to be enjoyed.

(k) If the petitioner's expenses became accruals in 1928 then necessarily the petitioner's commissions for services became accruals in 1928 and, in that event, said amount of $183,048.15 erroneously was reported by the petitioner as income for the year 1931.

(l) The items of $96,000 for 1929 and $47,500 for 1930, comprising the total of $143,500 disallowed as deductions in computing the disallowed net losses in the aggregate of $124,992.39 and resulting in the deficiency now alleged by respondent for 1931 as shown in said Exhibit "A", became accrued expense of the petitioner in the respective years of 1929 and 1930, for the reason that at no time prior thereto did any of the individuals to whose favor said respective credits were made, have any right to demand said specific [fol. 10] amounts as were respectively agreed upon as then the subject of such demand in said respective years.

(m) In recognition of such creation of right to demand in said respective years, the petitioner made certain actual payments within said years in application in part against said accruals but made no claim of deduction upon its respective returns for said years with respect to such actual payments, because the accruals were inclusive in amount as to said payments.

(n) By force of the nature of the contracts whereunder the petitioner became entitled to commissions for services performed in 1928 and years prior thereto it was impossible for the petitioner to determine the ultimate realization from

those contracts, within the year 1928. For the same reason it was impossible for the petitioner to determine the amounts in 1928 to which any persons would be entitled as compensation for their services performed in 1928 and years prior thereto. Accordingly, it was understood that such compensation would depend upon such realizations from commissions or the expectancy of commissions as various disputes became the subject of apparent adjustment. That situation resulted in the petitioner actually coming to agreements with various persons in the years 1929 and 1930 respectively as to the amount so accrued as expenses in those years and from such agreements resulted the first right of demand accruing to such persons. Partial payments were made within those years respectively and debited to such accruals which at no time prior to such [fol. 11] agreements in the respective years 1929 and 1930 were either ascertainable or determinable as expenses.

(o) If the respondent had taken his present, peculiar position that commissions were accruable when received but the expenses connected with those commissions were accruable in 1928, then the respondent's audits for the years 1928, 1929, and 1930 would have resulted in determinable losses for each of those years (by force of other losses and expenses not connected with the contracts in question) and would have resulted in the respondent's own determination of overpayment of the entire taxes paid for the year 1928, with resulting refund to petitioner.

(p) The respondent now seeks a double collection of taxes from the petitioner through an inconsistent treatment of the accounts of the petitioner, to the monetary advantage of the respondent and corresponding disadvantage to the petitioner who relied upon the prior action of the respondent in approving the net losses for 1929 and 1930 and the petitioner's system of accounting.

(q) The respondent is estopped from making such assertion of deficiency for the year 1931, for the several reasons aforesaid.

(r) The respondent's alleged notice of deficiency for the year 1931 evidenced by Exhibit "A", represents an attempt to assert taxes for prior years which now are barred by the running of the Statute of Limitations and is without any [fol. 12] authority under the law, all due to a reversal of

position as to the correct system of accounting. In no other way may a position of consistency be credited to the respondent. If the petitioner's expenses of 1929 and 1930 should be accrued deductions to 1928, then our 1931 commissions also should have been accrued to 1928 which year is now barred.

Wherefore, the petitioner respectfully prays that this honorable Board may hear its appeal and redetermine the deficiency if any and find the facts as alleged by the petitioner, or determine no deficiency for the reason that the respondent is estopped from asserting any deficiency, and that the Board order such other relief to the petitioner as may be properly due in the premises.

(S.) Edmund S. Kochersperger, Counsel for the Petitioner, 806 Investment Bldg., Washington, D. C.

Duly sworn to by Otto E. Kuhn. Jurat omitted in printing.

[fol. 13] EXHIBIT "A" TO PETITION

IT:AR:B-4.
LHB:6OD.

Feb-8 1934.

Textile Mills Securities Corporation, 84-182 Dayton Avenue, Passaic, New Jersey.

SIRS:

You are advised that the determination of your income tax liability for the year 1931, discloses a deficiency of $14,-(illegible)27 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928 notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

However, if You Do Not Desire to Petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early [fol. 14] assessment of any deficiency and preventing the accumulation of interest charges, since the interest period

terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier: Whereas if This Form is Not Filed, interest at the rate of 6% per annum will accumulate.

Respectfully, Guy T. Helvering, Commissioner, by
(Signed) Chas. T. Russell, Deputy Commissioner.

Enclosures:

Statement.
Form 870.

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eet-3

(Page 2)

Statement

IT:AR:B-4.
LHB:6OD.

In re: Textile Mills Securities Corporation, 84-182 Dayton Avenue, Passaic, New Jersey

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1931	$14,085.27	None	$14,085.27

The deficiency shown herein is based upon facts and data now before the Income Tax Unit in connection with the report dated February 28, 1933, prepared by Revenue Agent [fol. 15] A. J. Auerbach, copy of which you have received.

Careful consideration has been accorded your protests dated April 3, 1933 and December 19, 1933, in connection with the findings of the examining officer and the information submitted at a conference held in this office.

As a result of these findings, your income tax liability has been redetermined as follows:

Net loss reported	($7,615.15)
Less:	
Prior year net losses disallowed	124,992.39
Net income corrected	$117,377.24

Explanation of Adjustments

Net loss reported for 1929	($101,405.56)
Less:	
Nontaxable income	6,532.08
Statutory net loss carried forward	($94,873.48)

(Page 2)

Textile Mills Securities Corporation		Statement
Brought forward		($94,873.48)
Less:		
Expenses incident to legislative work		96,000.00
Net income as corrected for 1929		$1,126.52
Net loss reported for 1930		($134,797.93)
Less:		
Nontaxable income	$9,805.54	
1929 net loss disallowed	94,873.48	
[fol. 16] Expenses incident to legislative work	47,500.00	152,179.02
Net income as corrected for 1930		$17,381.09

Your contention for the allowance of deductions for expenses incident to the enactment of legislation authorizing the return of property of certain German citizens and corporations seized during the World War, has not been conceded for the reason that the services were performed during the year 1928 when the Settlement of War Claims Act was passed.

Inasmuch as your books were kept on the accrual basis, the amount of $143,500.00 so expended should have been accrued as at December 31, 1928.

The following amounts paid attorneys have been classified to show amounts paid for services in connection with contracts and for legislative expenses, as shown in your supplemental brief dated June 26, 1933:

1929	Contract Services	Legislative Work	Total
George S. Ward	$2,867.60		
Thomas R. Creighton Jr.	3,000.00		
Ivy Lee		$45,000.00	
F. W. Mondell		46,000.00	
M. B. Schreeve	10,200.00		
Honorable W. F. Martin	5,000.00		
C. Ermelbauer	5,767.50		
A. R. Johnson Jr.		5,000.00	$122,835.10
Total	$26,835.10	$96,000.	$122,835.10

[fol. 17] (Page 3)

Textile Mills Securities Corporation Statement

1930	Contract Services	Legislative Work	Total
George S. Ward	$10,243.90		
Warren F. Martin		$40,000.00	
J. Reuben Clark		7,500.00	
H. de Haas	2,500.00		$60,243.90
Total	$12,743.90	$47,500.00	$60,243.90

Inasmuch as the expenses totalling $26,835.10 and $12,743.90 were incurred in connection with contracts involving the personal services of the above-mentioned attorneys in securing the return of property to German citizens and companies from the Alien Property Custodian, for the years 1929 and 1930 respectively, these amounts have been allowed as deductions in accordance with section 43 of the Revenue Act of 1928.

The amounts of $96,000.00 and $47,500.00 representing sums spent for the promotion of legislation are not deductible from gross income in accordance with article 262 of Regulations 74 promulgated under the Revenue Act of 1928 and section 43 of the same Act.

Computation of Tax

Net income	$117,377.24
Less:	
Exemption	none
Amount subject to tax at 12%	$117,377.24
[fol. 18] Correct income tax liability	$14,085.27
Income tax previously assessed	none
Deficiency	$14,085.27

eet-3.

[fol. 19] Before United States Board of Tax Appeals

Answer—Filed May 25, 1934

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal

Revenue, for answer to the petition filed by the above-named taxpayer, admits and denies as follows:

First. Admits that the petitioner is a corporation organized under the laws of the State of Delaware and having its place of business in Passaic, New Jersey. For lack of sufficient information to form a belief, denies the remaining allegations of paragraph First of the petition.

Second. Admits that the notice of deficiency (a copy of which is attached to the petition and marked Exhibit A) was mailed to the petitioner on February 8, 1934.

Third. Admits the allegations of paragraph Third of the petition.

Fourth. Denies that the respondent erred as alleged in subparagraphs (a) to (i), inclusive, of paragraph Fourth of the Petition.

Fifth. Denies the allegations of paragraph Fifth of the petition.

Sixth. (a) and (b). Denies the allegations of subparagraphs (a) and (b) of paragraph Sixth of the petition.

[fol. 20] (c) Admits the allegations of subparagraph (c) of paragraph Sixth of the petition.

(d) to (r). Denies the allegations of subparagraphs (d) to (r), inclusive, of paragraph Sixth of the petition.

Seventh. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) Robert H. Jackson, General Counsel, Bureau of Internal Revenue.

Of counsel: Hartford Allen, David R. Shelton, Special Attorneys, Bureau of Internal Revenue.

[fol. 21] BEFORE UNITED STATES BOARD OF TAX APPEALS

TEXTILE MILLS SECURITIES CORPORATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 75423

Findings of Fact and Opinion—Promulgated September 28, 1938

The petitioner, a domestic corporation, was engaged generally in representing foreign interests respecting their property and business affairs in the United States. Because of its relationship to such foreign interests it was employed as an agent by various aliens whose property had been seized during the World War under the Trading with the Enemy Act, to present their claims to Congress with a view to obtaining, under anticipated Congressional enactments, either a return of their property or compensation therefor. The petitioner was to bear all expenses in connection with its employment and as compensation was to receive a stated percentage of the money or the value of the property it was able to recover. In pursuance of its employment the petitioner incurred certain expenses which had for their objective the enactment by Congress of the Settlement of the War Claims Act of 1928. Held, on the facts that such expenses constituted ordinary and necessary business expenses within the meaning of the statute and therefore are allowable deductions in determining taxable net income.

[fol. 22] E. S. Kochersperger, Esq., for the petitioner.

J. H. Pigg, Esq., for the respondent.

This proceeding involves a deficiency in income tax determined by the respondent in the amount of $14,085.27 for the year 1931.

All issues raised in the petition have been disposed of by stipulation with the exception of certain expense items incurred by petitioner in the years 1929 and 1930, the disallowance of which by the respondent has reduced the amount of net loss claimed and carried forward by the petitioner to the taxable year. The expenses in question were incurred by the petitioner in its efforts to procure the enactment of legislation which would permit certain aliens to recover

property seized by the United States during the World War under the Trading with the Enemy Act, and the question presented is whether or not the expenses so incurred constitute allowable deductions within the meaning of the statute.

Findings of Fact

This proceeding was submitted upon a stipulation of facts and the stipulation is adopted as our findings herein. We shall set forth so much of the facts as is considered necessary for discussion of the issues to be determined.

The petitioner was incorporated in 1924 under the laws of the State of Delaware. Its income tax return for the taxable year was filed with the collector of internal revenue at Newark, New Jersey. Its books were kept and its returns for the years here under consideration were made on the accrual basis.

[fol. 23] During the years material to this proceeding the petitioner's business activities included trading in securities, investing in domestic and foreign properties, and acting as agent for foreign and domestic principals. All of petitioner's officers had official or stockholding connections with one or more textile manufacturing corporations.

In 1924, through the personal contact of its officers with certain German textile interests whose properties in the United States had been seized during the World War under the provisions of the Trading with the Enemy Act, the petitioner was employed to represent those interests in the United States with a view to procuring legislation which would permit the ultimate recovery of their properties. The properties involved had an estimated aggregate value of $60,000,000 and in the event of success the petitioner was to receive as compensation 10 per cent of the amount or value of the property recovered. All costs and expenses incident to the undertaking were to be borne by petitioner. The contract or contracts were to terminate at the close of the second session of the Sixty-ninth Congress unless in the meantime appropriate legislation had been enacted.

In carrying on this campaign to procure the enactment of the desired legislation, the petitioner engaged the services of various persons and organizations, including Ivy Lee, Warren F. Martin, J. Reuben Clark, and F. W. Mondell. The Ivy Lee organization was employed to handle matters of publicity, including the making of arrangements for

speeches, contacting the press, in respect of editorial comments, and news items. Warren F. Martin, a former spe-
[fol. 24] cial assistant to the attorney general and J. Reuben Clark, a former solicitor of the State Department, were employed in connection with the preparation of propaganda concerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in time of war. F. W. Mondell, an attorney and a former member of Congress, was employed in connection with the preparation and making of proposals and suggestions to members of Congress, "the aim of which was to promote the speedy enactment of the desired legislation". Subsequently Mondell appeared as attorney before the Alien Property Custodian and certain courts on behalf of the alien individuals whose claims were in controversy.

A bill for the settlement of war claims was introduced and passed the House of Representatives during the second session of the Sixty-ninth Congress and was favorably reported to the Senate by the Senate Finance Committee, but had not passed that body when Congress adjourned on March 4, 1927.

Thereafter and prior to the opening of the first session of the Seventieth Congress on December 5, 1927, the petitioner undertook to negotiate new contracts similar in terms to those which had expired. Its efforts resulted in the procuring of new contracts from many of its former principals, but on terms less favorable than in the original contracts. The new contracts provided for the payment of 3 per cent of the amount or value of property received by the claimant and for an additional 2 per cent in respect of money or property paid over to the claimant within one year after enactment of the desired legislation. The new con-
[fol. 25] tracts also, as previously, required that the petitioner pay all costs and expenses incurred in its performance thereof. The new agreements were to run for a period of three years beginning with January 1, 1928.

Under the original contracts petitioner had incurred considerable expenses in the form of fees and compensation. In several instances definite arrangements or agreements had not been made with the individuals employed as to the amounts of fees or compensation to be paid for their respective services.

Without further arrangement or agreement, Lee, Martin, Clark, and Mondell continued their work after the close of

the second session of the Sixty-ninth Congress on March 4, 1927. The objective of the campaign so carried on by the petitioner was accomplished during the Seventieth Congress by the passage of the "Settlement of the War Claims Act of 1928", subsequent to which no services were rendered to the petitioner by Lee, Martin, and Clark. Mondell continued to render services, however, during the remainder of the year 1928 and thereafter. These services were legal services, including appearances before the Alien Property Custodian and certain courts, as previously described.

After the close of the Sixty-ninth Congress on March 4, 1927, and during the latter part of 1928 petitioner made various payments to Lee, Martin, Clark, and Mondell, pursuant to the informal agreements or understandings above described, none of which payments are in controversy in this proceeding.

[fol. 26] Early in 1929 petitioner received a bill from Ivy Lee for $50,000 for services rendered in connection with the contracts mentioned. The amount claimed was in addition to the sums already paid. There was some controversy over the amount, but after discussion of the matter Lee was advised that his claim for additional compensation had been recognized and that payment would be made. He was thereupon credited upon the petitioner's books with the sum of $50,000 and payments in respect of that sum were subsequently made. In its return, however, petitioner claimed as a deduction only $45,000 of the $50,000 item just described. In the same year and under circumstances similar to those set forth with respect to the compensation credited to Lee the amount of Mondell was credited with the sum of $46,000.

In 1930, Warren F. Martin and J. Reuben Clark were credited on petitioner's books with sums of $40,000 and $7,500, respectively, as compensation for services rendered in connection with the above contracts and the amounts so credited were taken by the petitioner as deductions on its 1930 return.

In its return for the year 1929 petitioner reported a net loss of $101,405.56 and for the year 1930 a net loss of $134,797.93. For 1931, the year before us, the petitioner brought forward from 1929 a net loss in the amount of $94,873.48 and from 1930, a net loss, as adjusted, in the amount of $30,118.91, and reported on its return for 1931 a net loss in the amount of $7,615.15.

In determining the deficiency herein the respondent reduced the net losses shown on the 1929 and 1930 returns by [fol. 27] the disallowance of the deductions claimed by the petitioner in respect of the amounts credited Lee, Mondell, Martin, and Clark, as outlined above. It is now agreed between the parties that the amount credited to Mondell in 1929 was for legal services rendered "in connection with particular claims of petitioner's principal, after the enactment of the 'Settlement of War Claims Act of 1928' " and the deduction of that amount has been conceded by the respondent as proper. The respondent also concedes that the amount credited to Ivy Lee in 1929 and the amounts credited to Martin and Clark in 1930 were properly accrued on the petitioner's books for those years, but does not concede that they were deductible. The deductibility of these items is the only matter left for our determination. In that respect it is stipulated that if the said items do not represent allowable deductions the correct deficiency for the year 1931 is $10,186.18 but if they do represent allowable deductions there is no deficiency for that year.

Opinion

Turner: In his notice of deficiency the respondent rested his disallowance of the deductions here in issue on the provisions of article 262 of Regulations 74,[1] which states in part

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[1] Art. 262. Donations by corporations.—Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people

that "Sums of money expended for lobbying purposes, the [fol. 28] promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income." He makes no claim that the acceptance of employment such as is involved in this proceeding was not within the scope of petitioner's powers or business. Neither does he make any claim that the expenses incurred were not in fact ordinary and necessary in performing the services required of it under its contract. He now rests his claim wholly upon the decision of the United States Circuit Court of Appeals for the Ninth Circuit in Sunset Scavenger Co. v. Commissioner, 84 Fed. (2d) 453, which reversed the Board and approved the regulation cited. At the hearing his counsel stated that "the question in one sentence is whether the Board will follow that decision or whether it won't."

The petitioner admits that the expenses in question were incurred for services relating solely to the promotion of legislation, but claims that they were ordinary and necessary to the performance of the services required under its [fol. 29] contracts and were therefore allowable deductions under the statute, section 23 (a) of the Revenue Act of 1928.[2]

In Sunset Scavenger Co. v. Commissioner, supra, the court states that the statute is "ambiguous because it makes no determination of what is or is not an 'ordinary and necessary' expense" and holds that article 262 of Regulations 74, which limits "the sweeping terms of the statute by prohibiting the deduction" of the expenditures made to avert the enactment of legislation unfavorable to the taxpayer is controlling since the statutory provision allowing

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using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

[2] Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

the deduction of ordinary and necessary expenses has been reenacted without change in all of the revenue acts after the Revenue Act of 1918, under which the regulation in question was first promulgated. The court further states that the Board in G. T. Wofford, 15 B. T. A. 1225, and Los Angeles & Salt Lake Railroad Co., 18 B. T. A. 468, as well as in the case there under consideration, took the view that the expenditures must have been for some illegal purpose to place them outside the provisions of the statute. It was [fol. 30] held that such a conclusion was unsound in that it gave no consideration to the effect of the regulation and was equivalent to reading something into the regulation which could not there be found.

The petitioner questions both the application of the decision in Sunset Scavenger Co. v. Commissioner, supra, to the facts in the instant case and the reasoning of the court as to the purpose and effect of the regulation. As to the latter, it is argued that article 262 is not an interpretation of the term "ordinary and necessary expenses", but has to do with contributions which depend for their allowance as deductions upon an entirely different provision of the statute, and under such circumstances that Congress can not be said to have approved any such limitation or meaning of the term "ordinary and necessary expenses", as the respondent claims and the court has determined. While it is true that the article in question does appear in the Commissioner's regulation following the quotation of that provision of the statute, section 23 (n),[3] which deals with the allowance of charitable and other contributions as deductions, it is to be noted that the statute makes no allowance therein for the deduction of contributions or gifts made by a corporation, and the apparent purpose of the article is to show that, [fol. 31] while expenditures made by a corporation may not be deducted as contributions after the manner of an in-

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[3] Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * *

(n) Charitable and other contributions.—In the case of an individual, contributions or gifts made within the taxable year * * *.

dividual taxpayer, such expenditures are proper deductions as "ordinary and necessary expenses" where they are made legitimately and for the purpose of procuring a direct benefit "to the corporation as an incident of its business." In other words, the article clearly and obviously shows that the test of deductibility of expenditures by corporations is to be found in that portion of the statute governing the deductibility of ordinary and necessary expenses rather than in the provision of the statute covering the deductibility of contributions. Accordingly, the argument of petitioner that the Commissioner's regulation has no relation to the provision of the statute providing for the deduction of "ordinary and necessary expenses" must be regarded as unsound.

On the facts a distinction can be drawn between the instant case and Sunset Scavenger Co. v. Commissioner, supra, but in our opinion the distinguishing facts do not take the instant case outside the ruling of the court. It is true that in Sunset Scavenger Co. v. Commissioner the legislation in respect of which the expenditure was made would have directly affected the business in which the taxpayer was engaged, while in the instant case the petitioner was not promoting or opposing legislation which directly affected the business in which it was regularly engaged, but as an agent, was seeking to promote legislation for the benefit of others and its compensation was to be received for services rendered as such agent and not from the possible effect [fol. 32] the legislation might have on petitioner's business. In other words, the petitioner was lobbying in behalf of legislation for its own benefit only in so far as it would receive compensation for such lobbying activities from the parties who were to be directly affected and benefited. The activities, however, were none the less lobbying activities and the language of the regulation is sufficiently broad to cover the expenditures of both principal and agent. We are, therefore, unable to find the distinction claimed by the petitioner between the instant case and that of the Sunset Scavenger Co.

Accordingly, if we conclude, as did the court in Sunset Scavenger Co. v. Commissioner, that the regulation is to be applied in all cases where the activities in respect of which the expenditures are made may reasonably be said to fall within the terms of the regulation, we need go no further, even though the expenses are in fact ordinary and necessary

to the conduct of the taxpayer's business. In applying the statute and the regulation, however, the Board has consistently considered the facts in each particular case and has reached its conclusion as to whether or not the expenditures were in fact ordinary and necessary. See particularly Sunset Scavenger Co., 31 B. T. A. 758, and Los Angeles & Salt Lake Railroad Co., supra. With all due respect to the honorable court, we feel that the facts herein are such that obligatory application of the regulation would result in misapplication of the statute in the instant case. Compare William P. Kyne, 35 B. T. A. 202, wherein it appears that there was some question as to the legality of the business in [fol. 33] which petitioner was engaged, and Lelia S. Kirby, 35 B. T. A. 578, wherein it does not appear that the activities of the Southern Tariff Association, to which the petitioner made contributions, had a direct bearing on petitioner's business.

In section 12 of the Trading with the Enemy Act, under which the property sought to be recovered was seized, it is stated that "after the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct." (40 Stat. 424.) Obviously the only recourse for the restitution of the property so seized was with Congress, and in our opinion the language of the statute was in effect an invitation to the parties whose property had been seized to present their claims to Congress at the end of the war. Cummings v. Deutsche Bank, 300 U. S. 115, 120, 121. They were aliens and consequently were at some disadvantage in preparing and presenting their claims, and it was logical that they should seek aid and assistance in this country. The petitioner was engaged generally in the representation of foreign interests in connection with their property and business affairs in the United States and it was in keeping with the circumstances of both parties and the relationship between them that the petitioner should be employed by the particular group of aliens referred to herein in their efforts to recover the property which had been seized. The respondent has made no claim, as we have pointed out, that such employment was outside the scope of petitioner's powers or business and we have concluded from [fol. 34] the record that the services rendered were necessary for the accomplishment of the desired result. There

has been no showing that the petitioner indulged in any questionable practices in carrying out the purposes of its employment and no showing or claim that the activities in respect of which the expenses were incurred were against public policy. Cf. National Outdoor Advertising Bureau, Inc. v. Helvering, 89 Fed. (2d) 878. Accordingly we are unable to reach any conclusion except that the expenses here in question were in fact "ordinary and necessary" in the conduct of petitioner's business and, having reached that conclusion, it is our opinion that the statute directs their allowance as deductions in determining petitioner's net income. Cf. Lucas v. Wofford, 49 Fed. (2d) 1027, affirming 15 B. T. A. 1225.

Reviewed by the Board.

Decision will be entered under Rule 50.

DISSENTING OPINION

BLACK, dissenting:

Article 262 of Treasury Regulations 74, quoted in the majority opinion, provides, among other things, as follows: "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income." I think this is a wholesome regulation and correctly interpretative of the law. There seems to be little, if any, doubt that the expenditures which the petitioner sought to deduct as ordinary and necessary business expenses and which the Commissioner has disallowed as deductions from gross income fall within the foregoing reg-[fol. 35] ulation. The majority opinion, as I read it, concedes that fact, but holds that the regulation, when applied to expenditures such as were made in the instant case and disallowed by the Commissioner, is too broad and reads something into the law which is not there. I am unable to agree with that interpretation.

The Ninth Circuit in the Sunset Scavenger Co. case, cited in the majority opinion, gave unqualified approval to the quoted Treasury regulation as being a reasonable and correct interpretation of the law.

In William P. Kyne, 35 B. T. A. 202, and Lelia S. Kirby, 35 B. T. A. 578, we cited and followed the court's opinion

in the Sunset Scavenger Co. case. I am not convinced that we should depart from that position in the instant case. It is perfectly true, as the majority opinion points out, that there are some differences in the facts in the Kyne and Kirby cases from the facts of the instant case, but I do not think these differences are sufficient to justify a distinction and a different ruling in the instant case from that which we made in the Kyne and Kirby cases. I, therefore, record my dissent from the majority opinion and think the decision on this point should be for the Commissioner.

Mellott and Disney agree with this dissent. (Seal.)

[fol. 36] Before United States Board of Tax Appeals

Decision—Entered Nov. 28, 1938

Pursuant to the Findings of Fact and Opinion of the Board promulgated September 28, 1938, the respondent herein having on November 8, 1938, filed a recomputation and the petitioner having on November 21, 1938 filed an acquiescence therein, now therefore, it is

Ordered and Decided: That there is no deficiency or overpayment in income tax for the year 1931.

(S.) Bolon B. Turner, Member. (Seal.)

Entered Nov. 28, 1938.

[fol. 37] In United States Circuit Court of Appeals, Third Circuit

Petition for Review and Assignments of Error—Filed February 13, 1939

Now comes the Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Jurisdiction

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting

Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review, Textile Mills Securities Corporation, (hereinafter referred to as the taxpayer) is a corporation organized under the laws of the State of Delaware and having its place of business in Passaic, New Jersey. The said Textile Mills Securities Corporation filed its income tax return for the calendar year 1931 with the Collector of Internal Revenue for the Fifth District of New Jersey, whose office is located at Newark, New Jersey, and [fol. 38] within the judicial circuit of the United States Circuit Court of Appeals for the Third Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II

Prior Proceedings

On February 8, 1934, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1931 in the amount of $14,085.27, and sent by registered mail a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter, and on April 5, 1934, the taxpayer filed an appeal from the said determination with the United States Board of Tax Appeals.

The case was tried before the United States Board of Tax Appeals on December 15, 1936.

On September 28, 1938 the Board of Tax Appeals promulgated its findings of fact and opinion (38 B. T. A.—No. 82) and on November 28, 1938 entered its decision, wherein it was ordered and decided that there is no deficiency or overpayment in income tax for the year 1931.

III

Nature of Controversy

The question presented to the Board of Tax Appeals was [fol. 39] whether taxpayer is entitled to deduct certain expenses which were incurred by it in its effort to procure the

The taxpayer is a domestic corporation organized under the laws of Delaware. The Board of Tax Appeals found that in 1924, through the personal contact of its officers with certain German Textile interests, whose properties in the United States had been seized during the World War under the provisions of the Trading with the Enemy Act, the taxpayer was employed to represent those interests in the United States with a view of procuring legislation which would permit the ultimate recovery of their property, which had an aggregate value of $60,000,000.00. In the event of success, the taxpayer was to receive as compensation 10 per cent of the amount or value of the property recovered. All costs and expenses incident to the undertaking were to be borne by the taxpayer. The contracts were to terminate at the close of the second session of the Sixty-ninth Congress, unless in the meantime appropriate legislation had been enacted.

In carrying out this campaign to procure the enactment of the desired legislation, the taxpayer engaged the services of various persons and organizations, including Ivy Lee, Warren F. Martin, J. Reuben Clark and F. W. Mondell. The Lee organization was employed to handle matters of publicity, including the making of arrangements for speeches, contacting the press, in respect of editorial comments, and news items. Martin, a former Special Assistant to the Attorney General, and Clark, a former Solicitor of [fol. 40] the State Department, were employed in connection with the preparation of propaganda concerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in time of war. Mondell, an attorney and former Member of Congress, was employed in connection with the preparation and making of proposals and suggestions to Members of Congress, the aim of which was to promote the speedy enactment of the desired legislation. Subsequently Mondell appeared as attorney before the Alien Property Custodian and certain courts on behalf of the alien individuals whose claims were in controversy.

A bill for settlement of war claims failed to pass the Sixty-ninth Congress. However, the taxpayer secured new contracts and continued its efforts, with the result that the Settlement of War Claims Act of 1928 was passed by the Seventieth Congress.

In connection with its campaign for the promotion of

legislation, taxpayer incurred certain expenses which are in controversy, namely, $50,000.00 credited to Ivy Lee in 1929, and $40,000.00 and $7,500.00 credited to Warren F. Martin and J. Reuben Clark, respectively, in 1930. These items were disallowed as deductions by the Commissioner in accordance with Article 262 of Regulations 74 promulgated under the Revenue Act of 1928. The Board, however, held that these expenses were in fact "ordinary and necessary" in the conduct of taxpayer's business and that the statute directs their allowance as deductions in determining taxpayer's net income.

[fol. 41]

IV

Assignments of Error

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

1. The Board of Tax Appeals erred in holding and deciding that there is no deficiency or overpayment in income tax for the year 1931.

2. The Board of Tax Appeals erred in failing to hold and decide that there is a deficiency in income tax for the year 1931 in the amount of $10,186.18.

3. The Board of Tax Appeals erred in holding and deciding that the amount of $50,000.00 credited on taxpayer's books to Ivy Lee in 1929 was deductible from gross income for 1929.

4. The Board of Tax Appeals erred in holding and deciding that the amounts of $40,000.00 and $7,500.00, credited on taxpayer's books to Warren F. Martin and J. Reuben Clark, respectively, in 1930, were deductible from gross income for 1930.

5. The Board of Tax Appeals erred in holding and deciding that the amounts herein in controversy which taxpayer sought to deduct from gross income do not fall within Article 262 of Regulations 74.

[fol. 42]

6. The Board of Tax Appeals erred in failing to hold and decide that the amounts herein in controversy which taxpayer sought to deduct from gross income fall within Article 262 of Regulations 74.

5. The Board of Tax Appeals erred in holding and deciding that the facts herein are such that obligatory application of Article 262 of Regulations 74 would result in misapplication of the statute in the instant case.

8. The Board of Tax Appeals erred in holding and deciding that the services rendered in connection with the items in controversy were necessary for the accomplishment of the desired result.

9. The Board of Tax Appeals erred in holding and deciding that the expenses herein in controversy were in fact "ordinary and necessary" in the conduct of taxpayer's business and that the statute directs their allowance as deductions in determining taxpayer's net income.

10. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that [fols. 43-44] a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) James W. Morris, Assistant Attorney General; (Signed) J. P. Wenchel, RLW; (Sgd.) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue. Of Counsel: John M. Morawski, Special Attorney, Bureau of Internal Revenue.

JMM:spt 2-11-39.

Duly sworn to by John M. Morawski. Jurat omitted in printing.

[fol. 45] In United States Circuit Court of Appeals

Notice of Filing Petition for Review—Filed February 18, 1939

To Edmund S. Kochersperger, Esq., 806 Investment Building, Washington, D. C.:

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of February, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of February, 1939.

(Signed) J. P. Wenchel, RLW, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 15 day of February, 1939.

(Seal) Edmund S. Kochersperger, Attorney for Respondent on Review.

spt 2-11-39.

[fol. 46] In United States Circuit Court of Appeals

Notice of Filing Petition for Review—Filed February 23, 1939

To Textile Mills Securities Corporation, Passaic, New Jersey:

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of February, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the

assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of February, 1939.

(Signed) J. P. Wenchel, R. L. W., J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 20 day of February, 1939.

(Seal) Textile Mill Securities Corp., O. E. Kuhn, Asst. Treasurer, Respondent on Review.

sept 2-11-39.

[fol. 47] BEFORE UNITED STATES BOARD OF TAX APPEALS

STIPULATION OF FACTS—Filed December 15, 1936

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts may be taken as true, and that the same may be considered by the Board, as offered in evidence by the parties to this proceeding:

1. The petitioner was incorporated under the laws of the State of Delaware during the year 1924. Its income tax return for the calendar year 1931 was made to the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey.

2. Attached hereto and made a part hereof, as Exhibit "A", is a true and correct copy of the notice of deficiency, dated February 8, 1934, from which the petitioner's appeal was taken.

3. The petitioner's books were kept and its income tax returns were filed on the accrual basis.

4. During the years material to this proceeding, the petitioner was engaged in various business activities, including trading in securities, investing in domestic and foreign properties, and acting as agent for foreign and domestic principals. The petitioner's capital stock was held by three individuals who were also its officers, including Charles F. H. Johnson, as its president. All of the petitioner's officers

were likewise officers, directors and/or stockholders of one [fol. 48] or more manufacturing corporations in the textile industry.

5. During the year 1924, as a result of the personal acquaintances existing between petitioner's officers and certain German textile interests whose properties in the United States had been seized during the World War, under the provisions of the Trading with the Enemy Act, 40 Stat. 411, the services of the petitioner were engaged by various German interests, hereinafter referred to as claimants and/or principals, to the end that the petitioner should represent such claimants, as their agent in the United States, with a view to presenting their cause to the Congress of the United States, and the ultimate recovery by the claimants, under anticipated legislative enactments, of their properties, or compensation therefor. The original agreements in respect of such representation by the petitioner were entered into through the Reichsverband der Deutschen Industrie, a German organization similar to the United States Chamber of Commerce, the contracts being between the various claimants and the petitioner. By the time the petitioner embarked upon its program of performance, during the early part of the year 1926, it had entered into such representation contracts with claimants whose seized properties had an estimated aggregate value of $60,000,000.00. Under these representation contracts, the petitioner's compensation, in the event of success, was ten per cent, (10%) of the amount of value of the property recovered; all costs and expenses incident to the petitioner's undertakings to be borne by petitioner. Each of these original representation contracts contained a limitation clause, whereby all rights of the petitioner to compensation, and otherwise, terminated with the [fol. 49] close of the Second Session of the Sixty-ninth Congress, unless, in the meantime, appropriate legislation had been enacted.

6. The obligations of the petitioner under the aforesaid representation contracts were such as necessitated the conduct by the petitioner of an extensive educational campaign, the object of which was to acquaint and impress upon the American people and their representatives in Congress, the justice of the claims of the petitioner's principals. Such a campaign was conducted by the petitioner at its own expense. The carrying on of this campaign involved the

gathering and dissemination of historical data and precedents in respect of the policy of the United States relative to enemy-owned properties within its borders in times of war, international relations, treaty rights, etc., as well as the preparation and making of appropriate proposals and suggestions to Members of Congress, with a view to the expeditious enactment of the sought-for legislation. For these purposes the petitioner engaged the services of various persons and organizations, including Ivy Lee, W. F. Martin, J. Reuben Clark, and F. W. Mondell. The services of the "Ivy Lee" organization were utilized in connection with matters of publicity; including the making of arrangements for speeches and speakers around the country, cooperating with the Press in editorial comments, as well as news items, and work of a general publicity nature. The services of W. F. Martin and J. Reuben Clark were utilized in connection with the preparation of propaganda concerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in times of war. Their views on these subjects were expressed [fol. 50] in several publications; one, during the year 1926, which was presented to the Senate by a Member of that Body, entitled "American Policy Relative to Alien Enemy Property", which was published as Senate Document No. 181, Sixty-ninth Congress, Second Session, a true and correct copy of which is attached hereto and made a part hereof as Exhibit "B"; another, entitled "Status of Ex-enemy Property, Interpretation of Treaties and Constitution", being a forty-three page pamphlet, which was widely distributed through the facilities of "Ivy Lee", and otherwise, a true and correct copy of which is attached hereto and made a part hereof, as Exhibit "C". The services of F. W. Mondell, a Washington attorney and former Member of Congress, were utilized, prior to the enactment by Congress of the "Settlement of War Claims Act of 1928", to which enactment further reference will be hereinafter made, primarily in connection with the preparation and making of appropriate proposals and suggestions to Members of Congress, the aim of which was to promote the speedy enactment of the desired legislation. Thereafter, the services of Mr. Mondell were utilized by the petitioner by his appearances before the Alien Property Custodian and certain courts on behalf of certain of the petitioner's principals, whose claims were in controversy.

7. As a result of the campaign carried on by the petitioner, as aforesaid, and other efforts in that direction, a Bill for the settlement of war-claims was introduced in and passed by the House of Representatives during the Second Session of the Sixty-ninth Congress which began on December 6, 1926. This Bill was favorably reported by the [fol. 51] Senate Finance Committee to the Senate where debate thereon was completed, but due to a filibuster there was an adjournment of that Session of the Congress, by limitation, on March 4, 1927, without the enactment of this, and other bills.

8. In the performance of the work incident to the near accompl hment of its objective, as described in paragraph (7), supra, the petitioner had incurred considerable expenses in the form of fees and compensation to those whom it had employed in connection with its campaign for the dissemination of propaganda calculated to promote the desired legislation. Substantial sums on account thereof were paid by the petitioner during the years 1926 and 1927, as well as during the year 1928, after the failure of enactment of the aforesaid Bill. The petitioner's arrangements with several of the persons, whose services it had employed, were informal, and had not been reduced to definite agreements as to the amounts of the fees or compensation to be paid for their respective services. As a result of this situation difficulties and misunderstandings subsequently arose, to which further reference will be hereinafter made.

9. The enactment of legislation permitting of the return of or settlement for the seized properties of the erstwhile enemies of the United States not having been accomplished prior to the close of the Sixty-ninth Congress, all rights of the petitioner under its contracts with its German principals terminated. Thereafter, and prior to the opening of the First Session of the Seventieth Congress, on December 5, 1927, the petitioner undertook, through its representatives in Germany and otherwise, to negotiate new contracts, similar in terms to those which had expired. These efforts [fol. 52] were unsuccessful, although the petitioner did succeed in obtaining new contracts from many of its former German principals on terms less favorable to it than formerly. Typical of these new contracts is the following:

"Agreement made between (name of claimant) of the Republic of Germany, whose address is ——, Germany (here-

inafter called the Claimant) and Charles F. H. Johnson, of 200 Fifth Avenue, New York City, United States of America (hereinafter called the Agent).

"That for and in consideration of the premises and of the mutual promises and undertakings of the Claimant and Agent, hereinafter set forth, the Claimant and Agent agree to and with each other as follows:

"1. The Agent agrees to represent the Claimant in the United States of America and take any and all steps, and perform any and all services which he may deem necessary or advisable to protect the interest of the Claimant in moneys and/or securities or properties now held in trust for the Claimant by the Alien Property Custodian, and to bring about the return of the Claimant's property, and the return of all German money and/or securities or other properties or businesses seized by the United States or any of its Departments, representatives or agents; and said Agent agrees to make or cause to be made such appearance, with counsel to be retained by the Agent at his sole cost and expense before any Congressional Committee, or any Department, Court or Official of the Government of the United [fol. 53] States, as will aid in bringing about such return.

"2. The Agent further agrees to meet all costs and expenses incurred in the performance of his agency and not to render or hold the Claimant in any manner responsible therefor provided, however, that the Agent shall have the right to act for and represent others similarly situated.

"3a. The Claimant agrees at such time and place as the Agent shall direct, to pay to the Agent or his representative three per cent (3%) of any money and/or of the then value of any securities or other property received by the Claimant by or for account of the Claimant from said Alien Property Custodian or from any other branch or department of the United States, or any of its public officials.

"3b. In addition, the said agent shall receive two per cent (2%) in value on the amounts actually paid to the Claimant within one year after enactment of such legislation.

"4. This agreement is executed upon the understanding that it supersedes all previous agreements made by the

Claimant in respect to the subject matter hereof, except in the following particulars: It shall not be construed to empower the Agent hereunder to participate in or claim any benefits, unless otherwise agreed, of any litigation or application now pending in Court or before any governmental department for the return of Claimant's property under any law or decision effected previous to April 1st, 1927.

[fol. 54] "5. This agreement shall be in force for a period of three years beginning with the first of January 1928.

"6. It is further mutually agreed that all differences which might arise shall be submitted to an arbitration court consisting of three members, one appointed by the Agent, one by the Claimant, these two choosing the third who shall act as chairman. In the event that the two appointed members cannot agree upon the chairman then such chairman shall be named by the managing member of the Presidential Board of the Reichsverband der Deutschen Industrie. The decision of the Arbitration court shall be final and binding upon the parties hereto.

"Signed, sealed and delivered," etc.

(Note: The contracts were entered into in Germany in the individual name of the president of the petitioner corporation and then were assigned to the petitioner.)

10. Messrs. Lee, Martin, Clark and Mondell continued their respective services, as hereinabove described, to the petitioner until the enactment of the "Settlement of War Claims Act of 1928", on March 10, 1928, 45 Stat. 254, during the First Session of the Seventieth Congress which began on December 5, 1927, although they were cognizant of the circumstances incident to the failure of the enactment of the necessary legislation prior to the close of the Sixty-ninth Congress, and although no new or more definite agreements or understandings were made between them and the petitioner in respect of the amount of compensation they were to receive for their services in the promotion of the [fol. 55] desired legislation. The objective of the educational campaign so carried on by the petitioner was accomplished by the passage of the "Settlement of the War Claims Act of 1928", supra, subsequent to which no services were rendered to the petitioner by Messrs. Lee, Martin and

Clark. Mr. Mondell, however, continued to render services to the petitioner during the remainder of the year 1928, and thereafter. These services were legal services, Mr. Mondell being required to appear and represent various of the petitioner's principals before the Alien Property Custodian and certain courts, in connection with claims which were in controversy.

11. During the period subsequent to the close of the Second Session of the Sixty-ninth Congress, on March 4, 1927, and the latter part of the year 1928, the petitioner had made various payments to Messrs. Lee, Martin, Clark and Mondell pursuant to the informal agreements or understandings hereinabove referred to, none of which payments are in controversy in this proceeding.

12. During the early part of the year 1929, the petitioner received a bill from "Ivy Lee" for $50,000, for services theretofore rendered in connection with the petitioner's campaign for the promotion of legislation, in addition to the sums already paid on account thereof. The receipt of this bill by the petitioner gave rise to some controversy as to the amount "Ivy Lee" was to receive for the services rendered by his organization but after a discussion of the matter between the petitioner's officers and directors, the petitioner advised "Ivy Lee" that his claim for such additional compensation had been recognized and accepted by it, [fol. 56] and that payment thereof would be made in the future, as the petitioner's financial position permitted. Thereupon, and during the year 1929, there was credited to the account of "Ivy Lee", on the petitioner's books of account, the sum of $50,000.00. Payments subsequently made on account thereof have been debited to that account, with corresponding credits to petitioner's cash account.

13. Under circumstances similar to those set forth in paragraph (12), supra, the accounts of F. W. Mondell and A. R. Johnson, Jr., on the petitioner's books, were credited with the respective amounts of $46,000.00 and $5,000.00, during the year 1929. It is now agreed that the services for which these two amounts were so entered as accrued accounts payable on the petitioner's books, were legal services rendered by Messrs. Mondell and Johnosn in connection with particular claims of the petitioner's principals.

after the enactment of the "Settlement of War Claims Act of 1928", as hereinabove set forth.

14. Under circumstances similar to those set forth in paragraph (12), supra, except for the year during which they transpired, the accounts of Warren F. Martin and J. Reuben Clark, on the petitioner's books, were credited with the respective amounts of $40,000.00 and $7,500.00, during the year 1930. Subsequent payments made on these accounts were treated by the petitioner on its books of account in like manner as stated in paragraph (12), supra. The parties hereto agree that these two obligations so incurred and accrued on the petitioner's books of account, as well as the amount of $50,000.00, referred to and described in paragraph (12), supra, represent expenses incurred by the peti- [fol. 57] tioner directly in connection with the campaign carried on by it, as aforesaid, the purpose of which was accomplished by the enactment by Congress of the "Settlement of War Claims Act of 1928", as aforesaid.

15. In its income tax return for the year 1929, the petitioner reported a net loss of $101,405.56, computed as follows:

Gross income (exclusive of nontaxable dividend income of $6,532.08)		$195,967.16
Less:		
Deductions (not in controversy)	$201,372.72	
Other deductions:		
(a) Ivy Lee	45,000.00	
(b) F. W. Mondell	46,000.00	
(c) A. R. Johnson, Jr.	5,000.00	297,372.72
Net loss reported on 1929 return		$101,405.56

(a) This $45,000.00 item represents the item of like amount disallowed by the respondent as a deduction, as shown by page (2) of the statement which accompanied the notice of deficiency, Exhibit "A". This is also the same item referred to in paragraph (12), supra, which through

error was reported in the petitioner's 1929 return as $45,000.00, instead of the correct amount, $50,000.00.

(b) and (c). These amounts of $46,000.00 and $5,000.00 represent the items of like amounts disallowed by the respondent as deductions, as shown by page (2) of the statement which accompanied the notice of deficiency, Exhibit "A". They are also the same items as are referred to in paragraph (13), supra. The respondent now concedes that [fol. 58] these items, aggregating $51,000.00, represent allowable deductions for the year 1929.

16. In its income tax return for the year 1930, the petitioner reported a net loss of $134,797.93, computed as follows:

Gross income (exclusive of non-taxable dividend income of $9,805.54)			$203,958.95
Less:			
Deductions (not in controversy)		$196,383.40	
Other deductions:			
(d) Warren F. Martin		40,000.00	
(e) J. Reuben Clark		7,500.00	
Net loss—1929	101,405.56		
Less:			
1929 dividends	6,532.08	94,873.48	338,756.88
Net loss reported on 1930 return			$134,797.93

(d) and (e). These amounts of $40,000.00 and $7,500.00 represent the items of like amounts disallowed by the respondent as deductions, as shown by page (3) of the statement which accompanied the notice of deficiency, Exhibit "A". These are also the same items of like amounts referred to and described in paragraph (14), supra.

17. In its income tax return for the year 1931, the petitioner reported a net loss of $7,615.15, computed as follows:

[fol. 59]

Gross income (exclusive of non-taxable dividend income of $9,856.60)				$260,904.75
Less:				
Deductions (not in controversy)			$143,527.51	
Other Deductions:				
1929 net loss, as above			94,873.48	
1930 net loss, per return		$134,797.93		
Less:				
1930 dividends	$9,805.54			
1929 net loss	94,873.48	104,679.02	30,118.91	268,519.90
Net loss reported on 1931 return				$7,615.15

18. The petitioner waives the assignments of error contained in subdivisions (d), (e), (f) and (h) of paragraph "Fourth" of its petition. The respondent concedes that if the items remaining in controversy, i. e., $45,000.00 for the year 1929, and $40,000.00 and $7,500.00 for the year 1930, represent allowable deductions, they were properly accrued on the petitioner's books during those years.

19. If the items remaining in controversy, referred to in paragraph (18), supra, do not represent allowable deductions, the correct deficiency for the year 1931 is $10,186.18. If said items do represent allowable deductions, there is no deficiency for the year 1931.

(Sgd.) Edmund S. Kochersperger, Counsel for Petioner. (Sgd.) Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[fol. 60] In United States Circuit Court of Appeals

Order Re Transmission of Exhibits—Filed March 27, 1939

Upon consideration of the petitioner's motion and the causes shown in support thereof, and it appearing to the Court that the respondent has no objection to the entering of the order therein moved,

It is by the Court this 24th day of March, 1939,

Ordered: That the Exhibits "B" and "C", together with three copies thereof, which exhibits are attached to and made a part of the Stipulation of Facts called for by the Praecipe for Record herein, be transmitted in physical form by the Clerk of the United States Board of Tax Appeals to the Clerk of this Court, to be held in the custody of the Clerk of this Court and not incorporated in the printed transcript of record on review, but to be produced at the hearing of this cause for the benefit of the Court and counsel as part of the record on review; and it is further

Ordered: That the Clerk of this Court transmit forthwith a certified copy of this Order to the Clerk of the United States Board of Tax Appeals, to be by him incorporated in the record on review as transmitted.

By the Court, John Biggs, Jr., Circuit Judge.

JMM spt 3-o3-39

Order to Transmit Physical Exhibits Received and Filed March 24, 1939. Wm. P. Rowland, Clerk.

[fol. 61] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 62] BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR RECORD—Filed April 12, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.

2. Pleadings:

   (a) Petition.
   (b) Answer to Petition.

3. Findings of Fact and Opinion promulgated September 28, 1938.

4. Decision entered November 28, 1938.

5. Petition for Review.

6. Notices of Filing Petition for Review.

7. Stipulation of Facts, including Exhibits B and C, but excluding Exhibit A. Said Exhibits B and C, together with three copies thereof, to be transmitted in physical form pursuant to order of Court dated March 24, 1939.

[fol. 63] 8. Court Order dated March 24, 1939.

9. This Praecipe.

(Signed) J. P. Wenchel, R L W, Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within Praecipe is hereby admitted this 3rd day of April, 1939.

No objections.

Edmund S. Kochersperger, Attorney for Respondent on Review.

JMM-vbd-3-28-39.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7056

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

TEXTILE MILLS SECURITIES CORPORATION, Respondent

And afterwards, to wit, the 4th day of October, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable William Clark, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 21st day of May, 1940, enters the following order:

[fol. 66] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7056

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

TEXTILE MILLS SECURITIES CORP., Respondent

Order Directing Re-argument

Before Biggs, Maris and Clark, Circuit Judges

It is hereby Ordered that the above entitled case be restored to the calendar for rehearing, and that the reargument be fixed for Monday, July 1, 1940, before the court en banc.

John Biggs, Jr., Circuit Judge.

Philadelphia, May 21, 1940.

[fol. 67] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7056

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

TEXTILE MILLS SECURITIES CORPORATION, Respondent

And afterwards, to wit, the 1st day of July, 1940 come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable William Clark, Hon. Charles Alvin Jones and Hon. Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 7th day of December, 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 68] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7056

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

TEXTILE MILLS SECURITIES CORPORATION, Respondent

On Petition for Review of Decision of the United States Board of Tax Appeals

OPINION—Filed December 7, 1940

Before Biggs, Maris, Clark, Jones and Goodrich, Circuit Judges

BIGGS, Circuit Judge:

Facts

Textile Mills Securities Corporation, the respondent taxpayer, is a Delaware Corporation. Its charter is not in

evidence, but it is stipulated that the taxpayer's business activities included trading in securities, investing in properties and acting as an agent for foreign and domestic principals. It also appears that all of the taxpayer's officers had connections either by way of official position or stock ownership in one or more textile manufacturing corporations. These officers were in touch with German textile corporations whose properties had been seized by the Alien [fol. 69] Property Custodian during the First World War under the provisions of the Trading with the Enemy Act (50 U. S. C. A. Appendix). In 1924 the taxpayer was employed by these German interests to represent them in the United States with the object of presenting their cause to Congress, and the ultimate recovery by the claimants, under anticipated legislative enactments, of their properties or compensation therefor. The properties had an estimated aggregate value of $60,000,000. Under the terms of the contracts under which the taxpayer was employed, in the event of success, the taxpayer was to receive as compensation ten per centum of the amount or value of the properties recovered. The expenses and costs incident to the undertaking were to be borne by the taxpayer. The obligations created by these contracts of retainer were to cease at the close of the Second Session of the Sixty-Ninth Congress unless the legislation sought had been enacted prior to adjournment.

The taxpayer worked vigorously to procure the desired legislation. It employed various persons and organizations, including the Ivy Lee organization, Warren F. Martin, J. Reuben Clark and F. W. Mondell. The Lee organization took charge of publicity, made arrangements for speeches and kept in touch with the press to the end that there might be editorial comment and news items. We think that it may be assumed with fairness that these news stories and editorials were to be favorable to the proposed legislation. Mr. Martin, who had been a former Special Assistant to the Attorney General, and Mr. Clark, who had been a former solicitor in the State Department, prepared brochures entitled respectively "Status of Ex-Enemy Property, Interpretation of Treaties and Constitution" and "American Policy Relative to Alien Enemy Property". The last is a comprehensive study of the history of the treatment of persons and property in war. Mr. Mondell, who is an attorney and a former member of Congress, was employed

by the taxpayer to make proposals and suggestions to mem-[fol. 70] bers of Congress to promote the speedy passage of the desired legislation. Mr. Mondell also appeared as counsel in hearings before the Alien Property Custodian and certain tribunals on behalf of the taxpayer's clients.

A bill for the settlement of war claims was introduced into and passed by the House of Representatives during the Second Session of the Sixty-Ninth Congress, but did not pass the Senate prior to adjournment. Before the beginning of the First Session of the Seventieth Congress, the taxpayer negotiated new contracts with its clients substantially similar in terms to those which had terminated except for the fact that these new contracts provided for the payment of 3% of the amount or value of property recovered by the claimant and for an additional 2% of the money or property paid over by the United States within one year after the enactment of favorable legislation. In short, the contingent compensation was reduced from 10% of the recovery to a maximum of 5% of the recovery. The new contracts provided that the taxpayer should pay the costs and expenses incurred by it in the performance of its obligations under the contracts. Messrs. Lee, Martin, Clark and Mondell continued their efforts on behalf of the taxpayer. The Seventieth Congress passed the "Settlement of War Claims Act of 1928", 45 Stat. 254. At this time the services of all the persons named except Mr. Mondell terminated. Mr. Mondell continued to render services during the remainder of the year 1928 and thereafter. His services may be characterized as purely legal and consisted of appearances and arguments before the Alien Property Custodian and certain tribunals.

The taxpayer paid to the four men named various sums for their services and reported a net loss for the year 1929 of $101,405.56 and a net loss of $134,797.93 for the year 1930. We are concerned only with the year 1931 for the taxpayer pursuant to statutory authority carried forward to that year its net loss for 1929 and 1930, resulting in a net loss for 1931 of $7,615.15. The Commissioner refused [fol. 71] to accept the losses claimed, disallowing as deductions the sums paid or credited by the taxpayer to Messrs. Lee, Mondell, Martin and Clark for the services performed by them. The Commissioner now concedes that the amounts credited to Mr. Mondell in 1929 were for services rendered "in connection with particular claims of petitioner's prin-

cipal, after the enactment of the 'Settlement of War Claims Act of 1928' ", in other words was compensation for legal services, not for procuring legislation, and therefore were properly deductible. The taxpayer claimed that the sums paid or credited to Messrs. Lee, Martin and Clark were deductible as ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business as provided by Section 23 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and were not prohibited by Article 262 of Treasury Regulations 74 as promulgated under that act. The Commissioner contended to the contrary. The Board held in favor of the taxpayer [1] and the petition at bar followed.

The Law

It should be observed that a contract for allegedly procuring the very legislation here involved was twice passed upon by the Court of Appeals for the District of Columbia in two cases, viz., Gesellschaft Fur Drahtlose Telegraphie M. B. H. v. Brown, 78 F. (2d) 410, and Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H., 104 F. (2d) 227, certiorari denied 307 U. S. 640, the court having before it a suit brought by an attorney to collect a contingent fee for services rendered by him in part in promoting the remedial legislation. In the first case cited the court held the contract to be void as against public policy, stating, p. 412, that there is "* * * a general condemnation of contracts for the procuring of legislation, especially where the legislation is remedial and provides for the assertion of claims against the government, and the contract is for [fol. 72] a contingent portion of a claim that may be given legal status through success in securing the legislation. Such contracts are illegal as tending to corrupt by improper influence the integrity of our political institutions. It is incumbent, therefore, upon the courts to pronounce void any such contract in which the ultimate or probable tendency would be to corrupt or mislead the judgments of legislators in the performance of their duties", citing Marshall v. B. & O. R. Co., 16 How. 314. While the decision in Marshall v. Baltimore & Ohio Railroad Company was based in part upon the concealment of the lobby and the lobbyist, the

[1] 38 B. T. A. 623.

general principles there enunciated are applicable to the case at bar for in our opinion those principles have not been modified by the decision in Steele v. Drummond, 275 U. S. 199. In the case last cited the Supreme Court pointed out that Drummond was not employed by Steele or the railroad company to secure the passage of the desired ordinance, but was himself interested in that very end as an owner of property.

The contracts between the taxpayer and its clients were to procure "favor legislation" as distinguished from "debt legislation". See the cases cited p. 229, note 7 to Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H., supra. Compensation for procuring the legislation was upon a contingent basis. In the light of both of these considerations, the contracts were null and void. The services performed by the taxpayer and its agents were rendered without suggestion of corruption and, with the exception hereinafter referred to, were not unethical, but as was stated in Hazelton v. Sheckells, 202 U. S. 71, 79, "The objection to them rests in their tendency, not in what was done in the particular case." Such contracts as were here made possess a tendency unduly to influence legislative action and to destroy the integrity of legislative institutions. The function of Congress in passing the War Claims Act was purely legislative. It was enacting a remedial statute and providing a method for the adjudication of claims thus created before another tribunal. A distinction is properly made [fol. 73] between contracts for contingent compensation for the prosecution of a debt or contract claim even though such a debt or claim may require legislation and appropriation, and "favor legislation" which creates a debt or claim. The second is prohibited; the first is permissible provided the interest is disclosed and the methods employed are legitimate.

As found by the Board of Tax Appeals, the Lee organization was employed to handle matters of publicity, "including the making of arrangements for speeches, contacting the press in respect of editorial comments and news items." Obviously these news items and editorial comments did not appear under the stated sponsorship of the taxpayer or its clients. The reader of such news comments and editorials including members of Congress could not have known that they emanated from a source inspired by self-interest. Such

practices tend to poison public opinion and should be condemned. See Marshall v. B. & O. R. Co., supra; Tool Company v. Norris, 2 Wall. 45; 6 Williston on Contracts, p. 4879; 17 C. J. Contracts § 213. The services rendered by the Lee organization were in and of themselves not otherwise than contrary to public policy.

The taxpayer expended the sums paid to the three individuals named, and now sought to be deducted, in the execution of a void contract. In our opinion such expenditures cannot be deemed to be ordinary. They are outside the norm of ordinary business conduct. A proper construction of Section 23 (a) requires its words to be given their "popular or received import". See Deputy v. duPont, 308 U. S. 488, 493, and Welch v. Helvering, 290 U. S. 111. Moreover, even if this were not so, the payment of moneys for carrying out a purpose contrary to public policy is by no means ordinary. The great weight of authority supports this view. See Burroughs Bldg. Material Co. v. Commissioner, 47 F. (2d) 178; Chicago R. I. & P. Ry. Co. v. Commissioner, 47 F. (2d) 990, certiorari denied, 284 U. S. [fol. 74] 618; Great Northern Ry. Co. v. Commissioner, 40 F. (2d) 372, certiorari denied, 282 U. S. 855, and United States v. Sullivan, 274 U. S. 259.

Quite apart from the foregoing, however, we cannot perceive how the taxpayer's lobbying expenses under the circumstances of the case at bar can be deemed to be necessary expenses in the light of the principles enunciated by the Supreme Court in its decision in Kornhauser v. United States, 276 U. S. 145, and Deputy v. duPont, supra, p. 494, for there is nothing contained in the stipulation of facts nor any finding by the Board that the services performed by the taxpayer or its agents were the moving or a contributing cause of the passage of the War Claims Act. We cannot perceive how proximate causation can be established between the efforts of lobbyists and the passage of desired legislation except where the efforts extend to actual corruption of individual members of a legislative body for, if the methods employed by the lobbyist be those of permissible persuasion, the legislative body still exercises its freedom of mind and independence of action. As that is the situation ordinarily to be presumed in the absence of a showing to the contrary, there is then interposed between the lobbyist and the law which he desires enacted an independent legislature. The business of the legislature re-

mains the passage of legislation for the public good. It follows that the payments here sought to be deducted could not proximately have served the taxpayer's business and were, therefore, unnecessary as a matter of law. In a far truer sense they resulted proximately from the business of the United States.[2] Where the law thus determines the want of necessity for expenditures in the operation of a business, it is neither appropriate nor allowable for the Board of Tax Appeals or the courts to find otherwise in [fol. 75] fact because of asserted special purposes or needs of the particular business.

The conclusion, that money spent for lobbying purposes is not deductible as an ordinary and necessary business expense within the intent of the Revenue Acts, is further confirmed by the implication to be derived from recurrent Treasury Regulations denying to corporations the right to deduct such expenditures as donations for business purposes. Thus, Article 262 of Regulations 74, promulgated under Section 23 (n) of the presently applicable Revenue Act (1928), provides in part, that "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income". A similar provision was contained in T. D. 2137, 17 Treasury Decisions, Internal Revenue (1915) (pp. 48, 57-58), later appearing as Article 562 of Regulations 45, promulgated under the Revenue Act of 1918. The same provision has appeared without change in regulations promulgated under the Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1934, 1936 and 1938. See Article 562 of Regulations 62, 65 and 69, Article 262 of Regulations 74 and 77, Article 23 (o)-2 of Regulations 86 and Article 23 (q)-1 of Regulations 94 and 101. It may be argued that Article 262 of Regulations 74 is in excess of the Treasury's power to promulgate interpretive regulations for the more efficient

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[2] In this connection it should be noted that Section 12 of the Trading with the Enemy Act provides in part that "After the end of the war any claim of any enemy or an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct; * * *."

administration of the Revenue Acts, in that, this particular regulation, which purports to interpret a statutory provision having to do with charitable contributions made by individuals, applies to corporations. Nevertheless, the regulation conforms in purpose with the congressional intent as restricted by the allowance of deduction for business expenses to such as are ordinary and necessary in law as well as in fact. This may not only be reasonably inferred from the legislative history of the repeated enactments of the particular statutory provision without con- [fol. 76] gressional disapproval or rejection of the regulation but that such was and is the congressional intent has more lately been impliedly confirmed by express statutory enactment.

By Sec. 23 (q) of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (26 U. S. C. A. It. Rev. Acts, pp. 830-831), Congress for the first time permitted corporations to deduct, within prescribed limits, donations for charitable uses if "no substantial part of the activities of * * * [the donee] is carrying on propaganda, or otherwise attempting to influence legislation;" etc.[3] If money paid to lobbyists were an ordinary and necessary business expense to a corporation, within the intent and understanding of Congress, then the denial by Sec. 23(q) of the right to deduct a contribution when used by the donee for such inhibited purpose could serve no effective end, for, as a business expense, the expenditure would none the less be deductible under Sec. 23 (a) of the Act of 1936. Furthermore, the allowance of deduction for business expenses under Sec. 23(a) of the Act of 1936 is specified in the very same words used in Sec. 23(a) of the Act of 1928. Consequently, moneys spent for lobbying not being ordinary and necessary business expenses under Sec. 23 (a) of the Revenue Act of 1936, as Sec. 23 (q) clearly implies, such expenditures are likewise not ordinary and necessary business expenses under Sec. 23(a) of the Act of 1928. In expressly denying by Sec. 23 (q) of the Act of 1936 any right to a corporate taxpayer to deduct contributions for lobbying, it was the evident intent of Congress to make sure by positive legislative direction that the privilege there granted to corporations of making deductible contri-

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[3] Repeated verbatim in Sec. 23 (q) of the Revenue Act of 1938, c. 289, 52 Stat. 447, 26 U. S. C. A. Int. Rev. Acts, p. 1016.

butions for charitable uses should not be laid hold of by a taxpayer to gain a credit against tax liability for expenditures which were not, and never had been, deductible as business expense.

For the reasons stated, we conclude that the sums paid by the taxpayer to the three individuals referred to are not ordinary and necessary expenses paid or incurred in carry- [fol. 77] ing on any trade or business. Accordingly, the Commissioner was right in disallowing the credits claimed for the sums so expended.

The Right of the Court to Sit En Banc

This case was originally heard by three circuit judges but before its decision this court, by special order, directed that it be reheard by the court en banc, consisting of the five circuit judges of the circuit in active service. The case has now been heard and considered by the court en banc. The order for rehearing was entered pursuant to Rules 4 and 5 of this court effective March 1, 1940, which are set out in a footnote.* The authority of a circuit court of

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*Rule 4 (Constitution of the Court. Quorum) is as follows:

"1. The Court—Judges Who Can Constitute It—Number of Judges to Sit. The court consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc.

"2. Quorum—Adjournment of Court in Absence of—By Whom Adjourned. Two judges shall consitute a quorum. If a quorum does not attend on any day appointed for holding a session of the court, any judge, who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day.

"3. Quorum—Interlocutory Orders in Absence of. Any judge attending when less than a quorum is present may make all necessary interlocutory orders relating to any matter pending in the court preparatory to the hearing or decision thereof."

appeals thus to provide for sittings to be held by all the [fol. 78] circuit judges has been questioned in the Ninth Circuit.[5] We therefore, deem it important to consider this question. We begin its consideration with a brief reference to the history of the federal judicial system.

The Judiciary Act of September 24, 1789, 1 Stat. 73, set up three categories of federal courts, the Supreme Court, the circuit courts and the district courts, and these courts continued to exist as thus set up (except as to the circuit courts for the period from February 13, 1801 to July 1, 1802) until the effective date of the Judicial Code, January 1, 1912, when the circuit courts went out of existence. The original scheme was for the Supreme Court to be held by justices ap-

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Rule 5 (Assignment of Judges) is as follows:

"1. By Whom Assigned—Disqualification of Assigned Judge—Designation of Substitute. The three judges who are to sit in the court at each daily session shall be designated by the senior circuit judge from time to time with the concurrence of a majority of the circuit judges who are in active service. If a judge so designated is unable to attend or is disqualified to sit in a particular matter the senior circuit judge shall designate an active circuit judge to sit in his stead, or, if no active circuit judge is qualified and able to sit, a retired circuit judge or a district judge of the circuit.

"2. Cases to Be Heard by Judges So Assigned. All matters pending in the court, except further proceedings in appeals and petitions previously heard on the merits and matters directed to be heard by the court en banc, shall be heard and decided by the judges who have thus been assigned to sit in the court at the time of hearing, if practicable.

"3. Exceptions. Further proceedings in appeals and petitions previously heard on the merits, except petitions for rehearing, shall be heard and determined by the judges who heard the original appeal or petition, if practicable, and may be heard at any time when the court is not otherwise in session. Petitions for rehearing shall be disposed of in the manner provided by Rule 35. If a rehearing is granted the reargument shall be heard by the judges who heard the original argument, if practicable, unless it is directed to be heard by the court en banc."

[5] Lang's Estate v. Commissioner, 97 F. (2d) 867.

pointed to it, the district courts to be held by district judges appointed to them, and the circuit courts to be held by supreme court justices and district judges sitting together. In 1802 provision was made for the definite assignment of the Supreme Court justices to the several judicial circuits. When thus assigned and holding circuit court they became known as circuit justices. (See Sec. 605, Rev. Stats.) The law was that the circuit justice of the circuit and the district judge of the district in which a circuit court was held might hold the court together or either of them might hold it separately.

The burden upon the Supreme Court justices at circuit became too heavy and by the Act of April 10, 1869, c. 22, Sec. 2, 16 Stat. 44, it was enacted "That for each of the nine existing judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit." This provision was carried into Sec. 607 of the Revised Statutes. The circuit judges thus appointed soon became primarily responsible for holding the circuit courts, largely relieving the circuit justices of this work.

[fol. 79] The business of the circuit courts continued to increase, particularly in the Second Circuit, and by the Act of March 3, 1887, c. 347, 24 Stat. 492, the President was directed to appoint for the Second Circuit "another circuit judge, who shall have the same qualifications and shall have the same power and jurisdiction therein that the present circuit judge, has under existing laws." By the Act of March 3, 1891, c. 517, sec. 1, 26 Stat. 826, the President was directed to appoint "in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws." Thus after the passage of this act, which, as we shall see, also created the circuit courts of appeals, there were in each circuit two circuit judges, except in the Second in which there were three.

In the light of this background we turn to the provision of Sections 2 and 3 of the Act of March 3, 1891, c. 517, 26 Stat. 826, 827, which created the circuit court of appeals. These sections were as follows:

"Sec. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges,

of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established * * *."

"Sec. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall [fol. 80] preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

"In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: Provided, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals * * *."

It will be seen that no provision was made for the appointment of a new group of judges to serve as judges of the circuit court of appeals which the act created. On the contrary it is clear that the court was intended to be held by three judges drawn from the three existing groups of judges who were by section 3 made "competent to sit as judges of the circuit court of appeals within their respective circuits," namely, the circuit justice of the circuit, the circuit judges of the circuit, and the several district judges within the circuit. By the later provisions of the section it is likewise apparent that the circuit justice and the circuit judges were the groups from which the judges of the new court were primarily to come, since it was only if three judges from these groups could not attend that district judges were to be called on. We stress the significant feature of the arrangement, which was that the court was to be staffed by judges who

were not permanently appointed to it, but who were to be drawn from time to time from existing groups of judges having primary responsibility for holding other courts, namely, the circuit justices for the Supreme Court, the circuit judges [fol. 81] for the circuit courts and the district judges for the district courts.

This situation continued until the passage of the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087. By Section 117 of the Code (36 Stat. 1131, 28 U. S. C. A. § 212), the provisions of Section 2 of the Act of 1891, supra, were codified without material change, as follows:

"Sec. 117. There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established."

The Judicial Code abolished on its effective date, January 1, 1912, the existing circuit courts, thus depriving the circuit judges of the courts for which they had been primarily responsible since 1869. We think the Code contemplated that the circuit judges should thereafter be ex officio judges of the circuit court of appeals rather than that they should be merely competent to sit in the court—which was their previous status. Although no express provision to this effect appears in the Code as originally enacted, it seems to us to be fairly inferable from two other provisions of the Code. The first is that Sec. 120 of the Code (36 Stat. 1132, 28 U. S. C. A. § 216), into which the provisions of Section 3 of the Act of 1891, supra, were carried eliminated the circuit judges from the classes of judges described as "competent to sit" in the court, while retaining in that category "The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit." The other provision supporting the inference is that although the circuit judges were no longer referred to as "competent to sit", later provisions of the same section which were also carried forward from Section 3 of the Act of 1891, supra, clearly showed that the circuit judges were intended to hold the circuit court of appeals and that the district judges should only be desig- [fol. 82] nated to attend if the court could not be made up by the attendance of the circuit justices and circuit judges.

It must be conceded, however, that the Judicial Code, did leave the relation of the circuit judges to the circuit court of appeals in some doubt.

At the time of the passage of the Judicial Code there were, as appears from Section 118 of the Code (36 Stat. 1131), four circuit judges in the second, seventh and eighth circuits. In view of the fact, as we have seen, that the code in Section 117 carried forward the provision of Section 2 of the Act of 1891 that the circuit court of appeals should consist of three judges, an anomalous situation was created with regard, at least, to the second, seventh and eighth circuits if the Code made the circuit judges ex officio judges of the court, since in each of those circuits there were four circuit judges. Since their circuit courts had been abolished, these judges had no court at all except the circuit court of appeals, but they obviously could not all be members of a court of three. A serious question thus was presented as to whether the circuit judges had become ex officio judges of the circuit court of appeals, and as to whether the circuit court of appeals in those circuits having more than three circuit judges consisted of all the circuit judges or only three of them, and if the latter, which three.

It was evidently to answer these questions that the Act of January 13, 1912, c. 9, 37 Stat. 52, was passed. This Act amended Section 118 of the Judicial Code, which had gone into force twelve days previously, by adding thereto the express provision that "The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law."

When the bill which became the Act of 1912 was under consideration in the Senate, Senator Sutherland who was in charge of the bill stated in debate (47 Cong. Record 2736): [fol. 83] "It makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit court of appeals." The report of the Committee on the Judiciary to the House of Representatives (House Rep. 199, 62d Cong., 2d Sess.) likewise said: "This bill deals with a defect in existing law. It makes it clear that the circuit judges shall constitute the circuit court of appeals." We think this legislative history makes doubly certain what is apparent

from the act, namely, that its effect was to make clear that the circuit judges, who theretofore had been primarily responsible for holding the circuit courts, should thereafter instead constitute the circuit court of appeals. The necessary effect of this provision was that in the case of each circuit having more than three circuit judges the size of the court was increased to equal the number of circuit judges authorized by law.

It may be suggested that the provision of the Act of 1912 that it should be the duty of each circuit judge to sit in the circuit court of appeals "from time to time according to law" indicated that the judges were to rotate in sitting. But the sitting is to be "according to law" and we find no provision in the statutes referring to or regulating the designation or assignment of circuit judges to sit in the court "from time to time". On the other hand Section 126 of the Judicial Code (36 Stat. 1132, 28 U. S. C. A. § 223), regulates the times when the circuit courts of appeals shall sit. It is doubtless to these provisions of law that the Act of 1912 refers, thus making it the duty of the circuit judges to sit in the court at the times which the law fixes for its sessions.

We think it necessarily follows from what has been said that the effect of the passage of the Act of 1912 was to amend by implication Section 117 of the Code, which provided that the court should consist of three judges, so as to provide that in the second, seventh and eighth circuits the court should consist of four judges. The further necessary effect was that thereafter as additional circuit judges were au- [fol. 84] thorized the size of the circuit court of appeals of the particular circuit was thereby increased. Consequently by the Act of June 10, 1930, c. 438, 46 Stat. 538, (28 U. S. C. A. § 213d) the Circuit Court of Appeals for the Third Circuit was increased to four judges and by the Act of June 24, 1936, c. 753, 49 Stat. 1903, (28 U. S. C. A. § 213d-1) to five. It is interesting to note that the Act of 1936 which added the fifth judge in the third circuit, directed the President "to appoint an additional circuit judge of the United States Circuit Court of Appeals for the Third Circuit." This act clearly contemplated an addition to the court as well as to the number of circuit judges in the circuit and confirms the construction of the statute which we have adopted.

Other considerations confirm our conclusion that this court consists of five judges, not three. We have seen that

under the amendatory Act of 1912 all five circuit judges of the circuit are judges of the circuit court of appeals. It has always been the practice of the court for all the circuit judges to join in the adoption of rules of court and in the appointment of the clerk and librarian of the court. Conceding this, it may be suggested that but three judges may sit in the court to hear and decide appeals. The act, however, is not capable of such construction. The language is "There shall be in each circuit a circuit court of appeals, which shall consist of three judges". It is not provided that the court, merely when hearing and deciding appeals, shall consist of three judges.

Furthermore, since the act is completely silent as to the manner in which the circuit judges who are to sit in particular sessions of the court are to be selected (a further persuasive indication that all are entitled to sit) if the court consists of three judges only it would appear that the first three circuit judges who ascended the bench at the opening of the term would constitute the court and as such would have power to make rules and orders of procedure limiting the activities of their fellow judges or excluding them entirely from service in the court. Obviously a construction [fol. 85] of an ambiguous statute which would countenance such an absurd situation, improbable as it is, ought not to be entertained.

A court, as distinguished from the quorum of its members whom it may authorize to act in its name, cannot consist of less than the whole number of its members. The whole cannot be less than the sum of its parts. To hold otherwise is not merely to affirm a plain contradiction in terms, but is also to destroy the authority of the court as a court and to open the way to possible confusion and conflict among its personnel and in its procedure and decisions. For an apt illustration see the conflict in decisions disclosed in John Hancock Ins. Co. v. Bartels, 308 U. S. 180. It cannot be presumed that Congress intended any such result when it increased the number of circuit judges above three. What we have said makes clear why we cannot agree with Judge Denman's contrary conclusion in Lang's Estate v. Commissioner, 97 F. 2d 867. We conclude that this court has power to provide, as it has done by Rule 4 (1), for sessions of the court en banc, consisting of all the circuit judges of the circuit in active service. The court which heard the reargu-

ment of the present case was accordingly lawfully constituted.

What has been said does not affect in any way the provision of Section 117 of the Judicial Code (36 Stat. 1131, 28 U. S. C. A. § 212), that two judges of this court shall constitute a quorum. Consequently it is entirely competent for the court to provide, as it has done by Rule 4, that three judges shall sit to hear all matters unless otherwise specially ordered and that two judges shall constitute a quorum. It has been the practice for the circuit courts of appeals to sit in groups of three judges. We think the practice is an excellent one which should be followed in all but exceptional cases. Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three [fol. 86] judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question. Common sense and sound practice dictate that the five judges of this court should be in a position to decide the principles of law and practice to which the court is to be committed. We think the statute does not stand in the way and that the court has the power under existing statutes to sit en banc.

Conclusion.

A majority of the court having concluded that the decision of the Board of Tax Appeals should be reversed, an order will be entered reversing that decision and remanding the cause with the direction to redetermine the tax in accordance with the view expressed by the majority.

I am authorized to state that Judge Jones concurs in this opinion.

CLARK, Circuit Judge, concurring.

The writer of this opinion concurs in the judgment reversing the decision of the Board of Tax Appeals. He is furthermore satisfied about the right of the Court to sit en banc and with the careful and clearly stated analysis of the facts. He wishes, however, to express a somewhat different legal emphasis from that of his brethren constituting, with him, the majority of the Court.

The task of interpreting the obscurities of the various taxing statutes always holds one's technical attention. It

does not so generally hold one's human interest as well. In the case at bar, however, both parts of the judicial nimbus are involved. The exact practices of the case at bar have received the unanimous condemnation of the courts,[1] of the legal text and periodical writers,[2] of the political scientists,[3] [fol. 87] and finally of the intended victims, as various statutes for the regulation of lobbyists bear witness.[4] The particular victims were the Senators and Representatives of the United States who expressed their feelings in 1934 in other tax legislation where they denied exemption to organizations, a "substantial part of the activities of which is carry-

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[1] Trist v. Child, 21 Wall. 441.

[2] 15 Amer. & Eng. Ency. of Law (2d Ed.) p. 969; Legislation—Control of Lobbying, 45 Harvard Law Review 1241 (note); Public Utilities: Expenditures to Influence Public Opinion, 14 Cornell Law Quarterly 233 (note); Contracts—Illegality—Lobbying, 12 Texas Law Review 85 (note); Lobbying Contracts—Contingent Fees—Public Policy, 14 Boston University Law Review 834 (note).

[3] Bryce, The American Commonwealth, Vol. 1, p. 555, Vol. 2, pp. 66, 514, 520, 653; Pressure Groups and Propaganda, 179 Annals of the American Academy of Political and Social Science, Odegard, Political Parties and Group Pressures p. 68; Bernays, Molding Public Opinion p. 82; McKean, A State Legislature and Group Pressure, p. 124; Catlin, The Role of Propaganda in a Democracy p. 219; Bernays, Crystallizing Public Opinion; Herring, Lobbying, 9 Ency. of the Social Sciences 565; Odegard, Pressure Politics; Herring, Lobbying in Congress; Crawford, Inside Story of Lobbying; Muller, Lobbying in Congress (The Reference Shelf, Vol. 7, No. 3).

[4] Ga. Code Ann. (Michie, 1926) Pen. Code §§ 325 (1)-(5); Ind. Ann. Stat. (Burns, 1926) §§ 8108-16; Kan. Rev. Stat. Ann. (1923) c. 46, §§ 201-10; Key. Stat. (Carroll, 1930) §§ 1999a 1-8; Me. Rev. Stat. (1930) c. 2, §§ 43-48; Md. Ann. Code (Bagby, 1924) art. 40 §§ 4-14; Miss. Code Ann. (1930) § 5477-84; Md. Rev. Stat. (1919) § 7154; Neb. Comp. Stat. (1929) §§ 50-302 to 304; N. H. Pub. Laws (1926) c. 4 §§ 28-33; N. Y. Legis. Law (1909) § 66; Ohio Gen. Code (Page 1932) §§ 6256-1 to 8; Okla. Stat. 1931 § 2292 (modified); R. I. Gen. Laws (1923) c. 123, §§ 1776-73; S. D. Comp. Laws (1929) §§ 5092-5100; Wis. Stat. (1929) §§ 346.20-26.

ing on propaganda, or otherwise attempting, to influence legislation", 26 U. S. C. A. § 103 (6).

The reason is plain. If argument was a matter of the critique of pure reason, it might be appraised apart from its source. As most argument depends upon disputed premises the burden of verification depends upon (is proportionate to) the impartiality of the arguer. Furthermore there exists the imponderable of sincerity. If a cause is espoused by a person you know or know of, his sincerity or insincerity is bound to affect the weight you give to his presentation. These considerations are particularly applicable in a democracy which tends increasingly away from Burke's theory of representation and toward the continental theory of a mandat imperatif. The thought the writer is attempting to express has been well phrased:

"A different element is infused when the nexus between the propagandist and his principal is hidden, for tribunals have developed a policy adverse to the exertion of secret influences upon public bodies. The question of the legality [fol. 88] of not disclosing the identity of those seeking to influence public action first arose in connection with lobbying contracts. Though without the slightest hint of fraud or dishonesty, many contracts were declared void as against public policy. Secrecy doomed the agreement. The cases demand frank dealing, where public interests are concerned. Secret efforts to touch the minds of the legislators, secrecy concerning the connection between lobbyist and client, these are the evils in the eyes of the tribunals. This same attitude towards legislative activities of agents whose principals are undisclosed is revealed by statutes in many states requiring the registration of all lobbyists".

> Public Utilities: Expenditures To Influence Public Opinion, 14 Cornell Law Quarterly 233, 233-234 (note).

Although the Board saw fit to ignore the circumstance, it might be noticed that the cases generally stress contingency of compensation as a sinister element in this class of contracts, Noonan v. Gilbert, 68 F. (2d) 775, and cases therein cited. The logic of this last position has been criticized in 14 Boston University Law Review 834 (note), above cited, but may, the writer should think, be justified on the ground that the necessary size of a contingent fee adds to the temptation of impropriety. Whatever, then, the ultimately

correct decision, it must be based on a repudiation of the Board of Tax Appeals theory of legitimacy.

The writer proceeds, then, on the assumption that the expenses here claimed deductible have met with the condemnation of every student, judicial or otherwise, of public affairs in a democracy, who has expressed his thoughts on the matter. Does that universal condemnation constitute a mandatory gloss of the adjectives "ordinary" and "necessary"? The writer thinks it does and he says further that the contrary view expressed by some judicial personalities rather shocks him. One of the latter speaking for the [fol. 89] majority of a divided court puts that position thus, "The revenue laws of the United States are not over squeamish", Alexandria Gravel Co. v. Commissioner, 95 F. (2d) 615, 616. Well, as far as the writer is concerned they are. The writer suggests to the learned Circuit Judge above quoted that the Congress will probably not thank him for his somewhat gratuitous interpretation of their legislative morals. The writer may say that the learned Court seems to have had some of the very same qualms they refuse to attribute to Congress. Anyway, they weakened they own decision by naively asserting that the State Senator of Louisiana employed to sell "sand and gravel" to the Highway Commission of the "kingfish" domain did not exert any "personal influence" (he was undoubtedly employed because of his expert knowledge of geology).

The important word is, of course, ordinary. Although the cases,[5] or most of them,[6] stress the conjunctive character of the phrase, they are rather compelled to emasculate necessary, and for obvious reasons. After all, very few things (and very few people) are indispensable. The highest authority[7] substitutes the milder "helpful" and certainly the practices in the case at bar were "helpful" to the respondent.

There are at least three possible methods of approach to a construction of the key adjective. They have all received judicial approval, but as they all, in the writer's

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[5] Hubinger v. Comm., 36 F. (2d) 724; Seufert Bros. Co. v. Lucas, 44 F. (2d) 528; Lloyd v. Comm., 55 F. (2d) 842, Alexander Sprunt & Son, Inc. v. Comm., 64 F. (2d) 424; 4 Words & Phrases (5th Series) pp. 417-425.

[6] A. Harris & Co. v. Lucas, 48 F. (2d) 187.

[7] Welch v. Helvering, 290 U. S. 111.

judgment, lead to the same Rome of non-deductibility, it is not important here which one is adopted. As a matter of English, the word is thus defined, "customary or established order, general, customary, usual or normal, such as is commonly met with, of the usual kind, often, not above, or rather below, the average level of quality, commonplace", New Century Dictionary p. 1197. It is clear that the writer is not in a position to determine whether the present prac- [fol. 90] tice is or is not a common occurrence in the American business world. The reported cases disapproving of the evil seem small in proportion to the extent of that world and the corresponding occasion for its exercise. That is, however, an unreliable guide as it does not take into account other factors which may have been producing causes. Testimony as to the realty of either the usual custom or the specific instance, although perhaps shameful, could like any other sad reality have been produced. A failure to offer the pleasanter evidence of an opposite tendency to a most ethical generosity cost the virtuous taxpayer his deduction in Welch v. Helvering, above cited.

A second interpretative test of ordinary is derived from the law of torts. The cases require the business act to be proximately caused, Alexander Sprunt & Son v. Comm., above cited, Comm. v. Continental Screen Co., 58 F. (2d) 625. In so doing they seem, at any rate, to be prescribing the requirement of foreseeability held essential to recovery in cases of indirect causation. That foreseeability in the writer's circumstance is, of course, the "reasonable contemplation of reasonable business men", 3 Paul & Mertens, Law of Federal Income Taxation, p. 46. This theory would seem to stem from some association of ideas. The word ordinary smacks of the average reasonable man and leads to the thought of the cognate proximate cause. It is probably as sensible to allow the deduction of foreseeable expenses as it is to allow recovery for foreseeable harm. It seems, nevertheless, a novel canon of statutory construction. The "reasonable contemplation of reasonable business men" like "reasonable care under the circumstances" sets up something of an imponderable standard. As juries and courts wrestle with the latter, so the courts must perhaps struggle with the former. To do so, they must be equipped with weapons in the shape of testimony and so under this test also the writer is confronted with the same failure of business proof he has already spoken of.

[fol. 91] The third angle of incidence is to the writer's way of thinking both the most satisfactory and most in accord with sound principles of legislative interpretation. It postulates an understanding of and a desire for the effective working of the democratic process on the part of all the organisms of that process. From that follows the assumption that any word capable of an interpretation consistent with the said effective working must receive such an interpretation and no other. And from that follows the further assumption that the Congress will be held to have intended to include in the word ordinary at minimum no practices falling below the standards to which the courts have given their own approval. In other words the courts will take for granted that the Congress did not intend to use a word capable of being stretched to cover acts which both it and the courts condemn and to benefit actors which both it and the courts refuse to help. Both Congress and the courts, as the writer has pointed out, have many times expressed their unfavorable opinion of these attempts to sell the pig of public welfare in the poke of public service. Mr. Justice Cardozo in Welch v. Helvering, above cited, with his usual felicity said, "The standard set up by the statute is not a rule of law; it is rather a way of life", 290 U. S. 111, 115. The writer refuses to sanction the Congressional way of life envisaged for the Congress by the Board of Tax Appeals.

So much for what the writer thinks to be principle. How much for what the petition claims to be the authority? Many more decisions than are cited in the briefs can be found in volume 3 of Paul & Mertens, Law of Federal Income Taxation. The learned authors thereof note the struggle that has shaken the courts in their efforts to arrive at what the writer is declaring to be the sound conclusion.

"* * * Underlying the whole question is the conflict between two major forces. On the one side is the desire to stultify or discourage criminal acts by denying the taxpayer [fol. 92] even incidental benefits therefrom as, for example, the deduction for income tax purposes of the expenses incurred in connection with the criminal act. This is the 'public policy' force. The conflicting force arises from the statutory warrant to deduct ordinary and necessary expenses of the business. One cannot predict with any degree of certainty the right to such deductions. If the act necessitating the expenditure is wholly tainted with criminality,

public policy prevails and the deduction is denied. On the other hand, if the act does no great violence, tested by the *mores* of the day, the Court may, sometimes by tortuous reasoning, emerge with a permission to deduct." 3 Paul & Mertens, Law of Federal Income Taxation, p. 44

Nevertheless, the weight of authority, if that is important, is on the writer's side. The cases both in the Board of Tax Appeals and in the courts are collected and collated in 3 Paul & Mertens, above cited, under the headings, Fines and Penalties § 23.45, Counsel Fees § 23.46, Cost of Legislative Representation: 'Lobbying' Fees § 23.47, and under the cognate titles, Charitable Contributions § 23.66, Gambling Expenses and Exchanges in Illegal Transactions § 23.156, Statutory Provision for Losses § 26.02, Nature of Organizations Which Are Exempt § 32.14. It is perhaps interesting to note that the same general problem has arisen under a somewhat similarly framed English statute,[8] and that the cases appearing in 17 Halsbary's Laws of England (2d Ed.) pp. 152 et seq., seem to be in harmony with the ethical view for which the writer is contending. See Inland Revenue Commissioners v. Warnes, & Co., 2 K. B. 444, Inland Revenue Commissioners v. Von Glehn, 2 K. B. 553. There is also one case in the Privy Council on Appeal from New Zealand wherein the expenditure denied deduction was by a brewery, for canvassing, advertising and printing directed to swaying the voters in a referendum on local option, Ward [fol. 93] and Company Ltd. v. Conn., 1 English Law Reports, Appeal Cases, p. 145.[9]

The Board of Tax Appeals, in one sense, two Judges of this Court and other Judges of other courts, in another sense,[10] stress the rule of administrative construction. They refer, of course, to Regulation 74, Article 262, which forbids

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[8] 8 & 9 Geo. 5, c. 40, Cases I & II, Sched. D, r. 3 (a).

[9] Taxation — Income Tax — Corporations — Deductions From Gross Income For Charitable Contributions as Ordinary Business Expense, 30 Columbia Law Review 1211 (note); Taxation—Income Tax Deduction—Commercial Bribery as an "Ordinary and Necessary" Expense, 35 Columbia Law Review 125 (note); Taxation—Income—Deductibility of Counsel Fees Paid by Corporation in Defense of Prosecution, 17 Virginia Law Review 831 (note).

[10] Vide Sunset Scavenger Co. Inc. 1. Comm., 84 F. (2d) 453.

any deduction, or at least a sort of quasi-charitable deduction, to corporations expending money "for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses".[11] The writer of this opinion has little faith in this rule. He quite agrees with the learned author of an article in the Yale Law Journal who says:

"Among the innumerable fictions which have formed a part of the science of law, that which holds the record for unrealism is the doctrine that where a statute has been reenacted in the same form after an administrative construction, Congress has silently approved and incorporated the existing ruling. Our tax laws are reenacted so repeatedly that this rule is invoked more often than the general statement as to the validity of regulations standing alone. Unfortunately, the reenactment rule presumes an attention on the part of Congress in connection with tax legislation which is more ideal than real. The thought is that Congress, each time it passes a revenue act, has omniscience as to all outstanding regulations and judicial decisions and that it will be thoroughly diligent to correct by legislation any interpretation with which it disagrees. There follows the thought that inaction is action in that a failure to legislate implies [fol. 94] an agreement with all outstanding regulations, without any apparent distinction as to their interpretative or legislative character.

"Anyone cognizant of the processes and exigencies of tax legislation is perfectly familiar with the simple fact that any such presumption is not only artificial, but in large part unfounded. * * *"

Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale Law Journal 660, 663-664 [12]

The writer finds no lack of logic in taxing income from illegal sources,[13] and refusing a deduction for the same type of expenses. After all, the word applicable to one face of

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[11] See 3 Paul & Mertens, above cited, § 23.66.

[12] cf. The Supreme Court On Administrative Construction as a Guide in the Interpretation of Statutes, 40 Harvard Law Review 469 (note).

[13] U. S. v. Sullivan, 274 U. S. 259.

the medal, income, is the broadest possible, whereas the words applicable to the other have the many limitations the writer has tried to indicate. Further, the medal as a whole embodies policies and a probable Congressional intent which must have consistent application. Any discouragement of ill-gotten gains entails a corresponding lack of sympathy with the means of getting them. Thus everything the rascal takes in must be taxed, and as little as possible of what he expends must be exempted. In conclusion, the writer might note that the decision of the Board of Tax Appeals runs contrary to everything they have previously decided.[14]

[fol. 95] MARIS, Circuit Judge, dissenting.

I fully concur in the opinion of my brethren that this court consists of all five circuit judges in active service and that the court may lawfully sit en banc, as it did in this case. I find myself, however, unable to agree with the conclusion which the majority have reached as to the merits of the case for reasons which I shall state.

The taxpayer entered upon the business of seeking to bring about the return of its principals' seized property through the passage of Congressional legislation authorizing such return. Its compensation was to be contingent upon and measured by its success in securing the return of the property and it was to bear all the expenses of its effort. Among these expenses were substantial sums paid to Ivy Lee for publicity work, including the making of arrangements for speeches and speakers around the country and cooperating with the press in editorial comments, as well as news items, and to W. F. Martin and J. Reuben Clark for the preparation of propaganda concerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in times of war. It is these sums which the taxpayer seeks to deduct from its gross income as ordinary and necessary expenses of its business in computing its net income subject to income tax. The majority of this court deny the right to the deductions upon grounds, none of which, in my opinion, is valid.

[14] Easton Tractor and Equipment Co. v. Comm., 35 B. T. A. 189; Mrs. William P. Kyne v. Comm., 35 B. T. A. 202; Alexandria Gravel Co. v. Comm., 35 B. T. A. 323.

Three of my brethren conclude that the Board of Tax Appeals erred in holding the deductions to be "ordinary" business expenses and therefore within the category of deductions permitted by the Revenue Act. As I understand it, they take the view that the expenses were not "ordinary" because they were paid in execution of a contract which was void as against public policy and because they were paid in an enterprise which was against public policy and which in any event did not meet the standard of morality in public affairs set by students of political science.

[fol. 96] Their conclusion that the contract between the taxpayer and its principals is against public policy is rested upon the decisions of the Court of Appeals of the District of Columbia in Gesellschaft Fur Drahtlose Telegraphie M. B. H. v. Brown, 78 F. 2d 410, and Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H., 104 F. 2d 227, holding void the provisions of a similar contract between alien claimants and an American agent which provided for the payment of compensation to the agent on a contingent basis. Those decisions were placed upon the ground that the Settlement of War Claims Act was "favor legislation" as distinguished from "debt legislation" and that a contract to procure "favor legislation" for a contingent fee is against public policy and, therefore, void. It was accordingly held that the agent might not recover the contingent fee stipulated for in the contract. I have grave doubt of the soundness of the distinction thus drawn between "favor legislation" and "debt legislation"[1] and I

[1] The distinction sought to be drawn, as I understand it, is between legislation designed to provide for or facilitate the settlement of existing claims against the government and legislation which confers benefits upon individuals who had no claims against the government prior to its passage. This distinction seems to have been first expressed by the Court of Appeals of the District of Columbia in the first Brown case, supra. I do not find the distinction referred to in any decision of the Supreme Court of the United States. On the contrary the rule of that court seems to be to strike down such contracts as against public policy if it appears to the court that they are likely to facilitate and encourage the corruption of the legislative body. Trist v. Child, 88 U. S. 441. If this is the test, as I think it is, it would seem

am clear that in any event the validity of the contract has no bearing on the question before us, for reasons which will be discussed later. But even if its bearing be conceded it seems to me that the Settlement of War Claims Act was in fact "debt legislation."

Section 7 of the Trading with the Enemy Act (50 U. S. C. A. Appendix § 7) authorized the seizure by the alien property custodian of enemy-owned property such as the [fol. 97] textile properties here involved, but it did not purport to confiscate these properties without return or compensation. On the contrary it clearly contemplated that the former owners had claims which would have to be dealt with after the war, for by Section 12 (50 U. S. C. A. Appendix § 12) the act provided that "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct." Here was not only the recognition of the existence of claims on the part of the former owners of seized property but also a clearly implied invitation to them to solicit from Congress legislation providing for the settlement of their claims. That the Settlement of War Claims Act which finally provided for these claims was "debt legislation" seems to me quite clear in the light of these circumstances.[2]

As I have already suggested, however, I think that even though the taxpayer's contract was void because in violation of a public policy which frowns upon the offering of a contingent compensation for procuring legislation, it does not follow that the expenses paid in carrying out the agency constituted by the contract were not ordinary busi-

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to follow that "debt legislation," since it is ordinarily devoid of general public interest and, therefore, not subject to public scrutiny during the process of enactment, would provide a much greater opportunity for legislation corruption than "favor legislation" which ordinarily affects a larger section of the public and is, therefore, subject to much greater public attention while being considered by the legislative body.

[2] For cases in which contingent fee contracts have been upheld under similar circumstances see Spalding v. Mason, 161 U. S. 375; Winton v. Amos, 255 U. S. 373, and Hollister v. Ulvi, 199 Minn. 269, 271 N. W. 493.

ness expenses. The illegality suggested is as to the manner of compensation and not as to the result sought to be accomplished. It, therefore, seems to me to be wholly immaterial to the decision of the case before us whether the contract between the taxpayer and its principals was void because of the contingent fee for procuring what the majority describe as "favor legislation." The fact remains that the business contemplated by the contract was carried through, the contingent compensation was paid and is now being taxed, and the expenditures here sought to be deducted were expended in carrying on that business and earning that compensation. The alleged invalidity of the [fol. 98] contract obviously does not affect the taxability of the income and I see no basis for holding that it affects the deductibility of the expenses.

It is said by the majority that since the expenditures in question were made in execution of a void contract they "cannot be deemed to be ordinary. They are outside the norm of ordinary business conduct." It is also said that the solicitation of legislation, commonly known as "lobbying", is against public policy and has been condemned by judges and political scientists and that "the payment of moneys for carrying out a purpose contrary to public policy is by no means ordinary." As my colleague Judge Clark puts it in his concurring opinion the public policy, which he suggests prohibits "lobbying," must be read as a mandatory gloss upon the adjective "ordinary' in the statute. To me this is not interpretation but amendment of the legislative language. Section 23(a) of the Revenue Act of 1928 authorizes the deduction in computing net income of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." The majority I think lose sight of the fact that the reference is to any trade or business. It seems obvious to me that the act contemplates that taxpayers will engage in all sorts of trades and businesses including businesses which are against public policy or even criminal in character, and that those expenses which are ordinary and necessary in each particular type of trade or business may be deducted from the income derived therefrom. The determination of the character of the expenses as ordinary and necessary is, therefore, not to be based, as the majority suggest, upon "the norm of ordinary business conduct" in general but is to be made in the light of the relation of the expenses to the

particular trade or business. As Mr. Justice Cardozo said in Welch v. Helvering, 290 U. S. 111, 113, "Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance."

[fol. 99] It seems to me that the majority by their decision are converting into a penal statute what was intended by Congress to be solely a revenue measure. The revenue laws, as Judge Sibley aptly said in Alexandria Gravel Co. v. Commissioner, 95 F. 2d 615, 616, "are not oversqueamish. By the broad definition of gross income, income arising from an illegal business is taxed even though the illegality be one declared by the Constitution itself. United States v. Sullivan, 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037, 51 A. L. R. 1020. The provisions of the statute fixing the deductions to be regarded in arriving at the net income which alone is taxed, 26 U. S. C. A. § 23, are as broad and unqualified as those defining the taxable gross income." There is no suggestion in these provisions that the word "ordinary" is to be restricted in meaning to those expenditures only which are not against public policy or which meet a moral standard laid down by textwriters and courts. On the contrary it has been held that business expenses are deductible even though by reason of the nature of the business they involve payments so clearly criminal as bribes for "protection." Steinberg v. United States, 14 F. 2d 564. As Judge Hough demonstrated in the case cited the income tax law is not a penal statute but a revenue measure. It taxes income derived from criminal enterprises as well as those which the law countenances and its purpose is to tax the net income derived therefrom not the gross receipts.

In the present case the business upon which the taxpayer entered was that of soliciting through propaganda the passage of legislation, commonly known as "lobbying." This is an activity which Congress has never seen fit to prohibit which has always been freely indulged in without restraint. The facts stipulated in the record before us do not show that the taxpayer indulged in any questionable practices or that its activities in respect of which the expenses were incurred were against public policy. It was encumbent upon the government to show that the taxpayer's activities were illegal or against public policy if such was [fol. 100] the case. It failed to do so. Certainly this court

may not indulge the presumption, as I think the majority do, that the petitioner was guilty of improper conduct not disclosed by the record merely because it did not produce affirmative evidence of its innocence.

The question which we are called upon to determine is whether the Board of Tax Appeals was in error in finding as a fact that the activities for the cost of which the taxpayer seeks deduction were ordinary in the particular business in which it was engaged. As we have seen, the taxpayer engaged Ivy Lee to arrange publicity and Martin and Clark to prepare progaganda. I think it must be conceded that publicity and propaganda are methods of procuring legislative action which have been universally employed in this and every other democratic nation. Since the business in which the taxpayer was employed was that of soliciting legislation by Congress it seems to me to be entirely clear that expenditures for publicity and propaganda were "ordinary" in its particular line of business within the meaning of the Revenue Act. It is wholly beside the point to consider whether such expenditures would be ordinary in business generally. It is doubtless true that expenditures for lobbying activities are not ordinary in the case of persons engaged in mining, manufacturing or commercial businesses, but here lobbying was not merely incidental to the taxpayer's business but itself constituted the business. I do not understand that it is suggested that the taxpayer's expenses were not of the kind ordinarily incurred in the business of lobbying. To hold that these expenditures are not "ordinary" within the meaning of the Revenue Act because we think that they contravene that undefinable concept of the judicial mind which the courts have called "public policy," or because they are deemed to be unwise or improper by political scientists and judges seems to me to be reading into the Revenue Act what is not there. In doing so the majority have placed the stamp of illegality upon conduct which Congress has never declared to be criminal. [fol. 101] I think that in thus restricting the plain language of the act this court is exercising a legislative and not a judicial function. I cannot agree that we have such power.

Two of my colleagues suggest that the Board of Tax Appeals erred in finding that the expenditures in question were "necessary" business expenses because the activities which they represent cannot be shown to have been the proximate cause of the legislation enacted by Congress.

Their view is that only those expenses are necessary which result in achieving the object sought by the taxpayer for which the expenditures were incurred and that in this case the taxpayer's expenditures could not have been the proximate cause of the passage of the legislation sought since Congress must be presumed to have acted independently in the public interest. I cannot agree that the Revenue Act contemplates any such restriction upon the deductibility of business expenses. Certainly it has never heretofore been suggested that the deductibility of a business expense is contingent upon the success of the business enterprise in which it is incurred. So to hold would impose an intolerable burden upon taxpayer and Commissioner alike. Nor do I see any merit in the suggestion that the expense was not necessary because Congress must have acted independently not not as a result of the taxpayer's activities. Mercantile advertising seems to me a perfect analogy. I do not think that my colleagues would go so far as to suggest that a merchant must be disallowed his trade advertising expenses because he cannot show that those expenses brought in customers or because he cannot show that the customers who did arrive came in under the hypnotic influence of his advertising and not in the exercise of an independent judgment in the light of their own self-interest. I entirely agree with Judge Clark that the word "necessary" as used in the act must be read as "helpful" and must be considered in the light of the enterprise in which the taxpayer is engaged rather than the result which it is seeking to achieve.

Finally two judges of the court take the ground that Article 262 of Regulations 74 prohibits the deduction of [fol. 102] expenses of the character involved in this case. I agree with the conclusion of the Board of Tax Appeals that this article of the regulations does not prohibit the deduction of these expenditures if they may fairly be classed as ordinary and necessary business expenses. The article in question is as follows:

"Art. 262. Donations by corporations.—Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and neces-

sary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income."

The article is arranged in the Regulations under Section 23 (n) of the Revenue Act. That section is entitled "Charitable and other contributions." It authorizes the deduction of such contributions in the case of an individual. By restricting deductions of this character to individuals the act denies them to corporations. I think that Article 262 was intended merely to be interpretive of Section 23 (n) [fol. 103] by making clear what that section leaves to inference, namely, that charitable and similar donations are not deductible as such by corporations and that lobbying and legislative expenses are likewise not deductible as such or in the guise of donations. The article was not intended to be interpretive of business expenses or to restrict the deduction of any expenditures which may fairly be deemed ordinary and necessary expenses of business under Section 23 (a) of the act. That this is so is borne out by the fact that Article 262 does not contain a cross-reference to Article 121 which does define business expense, while the latter, which states "As to items not deductible, see Section 24 and Article 281-284," does not contain a similar cross-reference to Article 262. Furthermore Article 262 itself points out that donations to charities may be deducted by a corporation as business expenses when made for purposes connected with the operation of its business.

The interpretation adopted by the majority would, it seems to me, render the article invalid as an invasion of the legislative power. Section 23 (a) of the Revenue Act authorizes the deduction of business expenses provided only that they are ordinary and necessary. Nowhere in the act is there any further qualification that they must not have

been incurred for lobbying or the promotion of legislation. Consequently the effect given to Article 262 of the Regulations, by the majority is, not to construe, interpret or implement an ambiguous, doubtful or general provision of the act, but rather to amend the unambiguous language of Section 23 (a) by adding to it a proviso to the effect that lobbying expenses shall not be deducted by a taxpayer even though they are ordinary and necessary in its business. It is settled that the law cannot thus be amended by regulation. Koshland v. Helvering, 298 U. S. 441; Manhattan Co. v. Commissioner, 297 U. S. 129. In Koshland v. Helvering, supra, Mr. Justice Roberts said (pp. 446, 447):

[fol. 104] "Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation. Congress having clearly and specifically declared that in taxing income arising from capital gain the cost of the asset disposed of shall be the measure of the income, the Secretary of the Treasury is without power by regulatory amendment to add a provision that income derived from the capital asset shall be used to reduce cost."

In Sunset Scavenger Co. v. Commissioner, 84 F. 2d 453, the Circuit Court of Appeals for the Ninth Circuit had under consideration the effect to be given to Article 262 of the Regulations. It held that this Regulation limited the sweeping terms of the statute by entirely prohibiting the deduction of lobbying expenses. This holding was based upon its conclusion that "the statute is ambiguous because it makes no determination of what is or is not an 'ordinary and necessary' expense." But what is "ordinary" or "necessary" as a business expense is clearly a question of fact to be determined in the light of the particular business in which the taxpayer is engaged. The words do not create an ambiguity but merely call for the exercise of the fact finding function. To permit the Commissioner of Internal Revenue to limit the scope of these words must necessarily

involve authorizing him "to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and pre-[fol. 105] cludes dispute," to use the words of Mr. Justice Sutherland in Miller v. United States, 294 U. S. 435, 440. To continue in his words: "This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." I am, therefore, not persuaded by the opinion of the court in the Sunset Scavenger Co. case that Article 262 should be given the broad construction which ~~the majority~~ my colleagues have placed upon it.

I am authorized to say that Judge Goodrich concurs in this dissent.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 106] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, TERM, 1939

No. 7056

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

TEXTILE MILLS SECURITIES CORPORATION, Respondent

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, and the cause is remanded to the said Board of Tax Appeals with the direction to redetermine the tax in accordance with the view expressed by the majority of this court.

John Biggs, Jr., Circuit Judge.

Philadelphia, December 7, 1940.

[fol. 107] Stamp: Received & Filed, Dec. 27, 1940. William P. Rowland, Clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 7056

Commissioner of Internal Revenue, Petitioner,

vs.

Textile Mills Securities Corporation, Respondent

Respondent's Motion for Judgment

The respondent respectfully moves for the entry of a judgment affirming the decision by the Board of Tax Appeals, said judgment to be ordered by a circuit court of appeals comprising Judges Maris and Goodrich as a quorum of two judges in a circuit court of appeals as prescribed by Section 117 of the Judicial Code.

The reasons or grounds for this motion are as follows:

By Section 1141 (a) of the Internal Revenue Code:

"The Circuit Courts of Appeals * * * shall have exclusive jurisdiction to review the decisions of the Board, [fol. 108] except as provided in section 239 of the Judicial Code, as amended * * * and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended * * *."

By Section 1141 (c) (1) of the Internal Revenue Code:

"Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

By Section 1142 of the Internal Revenue Code:

"The decisions of the Board rendered after February 26, 1926 * * * may be reviewed by a Circuit Court of Appeals * * * as provided in section 1141, if a petition for such review is filed by either the Commissioner or the

taxpayer within three months after the decision is rendered * * *."

By Section 1140 of the Internal Revenue Code:

"The decision of the Board shall become final—

"(b) (1) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed * * *.

"(2) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals * * *.

"(c) (2) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time [fol. 109] allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered * * *."

By R. S. Section 1008 as amended (Section 350, Title 28, U. S. Code Annotated):

"No * * * writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *"

By Section 240 Amended of the Judicial Code:

"(a) In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition *of any party thereto*, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." (Underlining added.)

In the matter at bar, wherein the respondent was forced before "a circuit court of appeals" by the petition for review filed by the petitioner, reviews of the Board decision have been had by two or more circuit courts of appeals presiding within the Third Judicial Circuit through deci- [fol. 110] sion rendered December 7, 1940, whereby one or more of said courts has rendered decision for the affirmance of the Board decision and one or more others of said courts has rendered decision for the reversal of the Board decision.

The respondent, acting within its rights, desires to apply for certiorari with reference to the decision of the Circuit Court of Appeals affirming the decision of said Board and comprising Judges Maris and Goodrich as a quorum of said Court of three judges prescribed by the Judicial Code, and will predicate its petition upon the existence of conflicting decisions by two Circuit Courts of Appeals within the Third Judicial Circuit and in the same case,—to wit, the case at bar,—as well as the importance of the question and the conflict of both decisions with the views expressed in Circuit Courts of Appeals within other judicial circuits.

However, the respondent stands barred of its right to so petition the Supreme Court for certiorari, except as a "judgment or decree" is rendered by said Circuit Court of Appeals comprising Judges Maris and Goodrich as a quorum of said Court.

Nor does the respondent possess the right to petition for certiorari prior to the entry of a judgment or decree, by [fol. 111] reason of the restrictions imposed in said R. S. 1008 to such an application being made "prior to the hearing and submission in that court," and the fact that such hearing and submission occurred not later than July 1, 1940.

Therefore, it is essential to the ends of justice in the respondent's prosecution of its statutory right, that the Circuit Court of Appeals comprising Judges Maris and Goodrich as a quorum of said Court do order the entry of a judgment in affirmance of the Board decision, and the respondent so moves for such a judgment.

Respectfully submitted, Textile Mills Securities Corporation, Respondent, by Edmund S. Kochersperger, 811 Investment Building, Washington, D. C., Attorney for Respondent.

[fol. 112] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7056

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

TEXTILE MILLS SECURITIES CORPORATION, Respondent

Before Maris and Goodrich, Circuit Judges.

The motion of the respondent for the entry of a judgment affirming the decision of the Board of Tax Appeals in the above entitled case is denied.

Albert B. Maris, United States Circuit Judge; Herbert F. Goodrich, United States Circuit Judge.

January 3, 1941.

[fol. 113] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this court in the case of Commissioner of Internal Revenue, Petitioner, vs. Textile Mills Securities Corporation, Respondent (No. 7056), on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 25th day of February in the year of our Lord one thousand nine hundred and forty-one and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 114] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 31, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,161, U. S. Circuit Court of Appeals, Third Circuit, Term No. 812. Textile Mills Securities Corporation, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed March 5, 1941, Term No. 812 O. T. 1940.